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HOSTILE ENVIRONMENT SEXUAL HARASSMENT: THE HOSTILE ENVIRONMENT OF A COURTROOM*

INTRODUCTION

Sexual harassment has received a tremendous amount of media and legal attention in the past several years.¹ Courts were initially reluctant to acknowledge sexual harassment as a pervasive problem, despite the alarming number of women claiming to have been harassed.² The Clarence Thomas/Anita Hill debacle resulted in a heightened awareness of sexual harassment and illustrated the fears intrinsic in a legal theory that often pits women against men.³ Women who allege sexual harassment fear retaliation and humiliation, not only in court, but in their personal and professional lives.⁴

* I want to thank Michael Marrs for offering his support, assistance, and friendship throughout the composition of this Comment. I also want to thank Morrison Torrey for teaching me the importance of speaking out against injustices facing women and my mother for giving me the courage to do so.

1. See, e.g., Judith Resnick, *Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings: Hearing Women*, 65 S. CAL. L. REV. 1333, 1333-35 (1992) (describing how the legal community and media began to acknowledge the problems of sexual harassment during the Thomas Clarence hearings).

2. In 1976, Redbook magazine published the results of their survey regarding sexual harassment. Of the approximately 9000 women responding, nearly 90% said they had experienced some type of sexual harassment on the job. The questionnaire was published in January, 1976 and the results appeared in November, 1976. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 26, 247 n.1 (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*]; see also BARBARA A. GUTER, *SEX AND THE WORKPLACE: THE IMPACT OF SEXUAL BEHAVIOR AND HARASSMENT ON WOMEN, MEN AND ORGANIZATIONS* 47-48 (1985) (stating that approximately 53% of working women say they have been sexually harassed in the work place). Perhaps the most extensive survey taken regarding sexual harassment was conducted by the United States Merit Systems Protection Board (MSPB). U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* (1981). In 1980, the MSPB surveyed 23,000 federal employees and found that 42% of all women reported some form of sexual harassment. *Id.* at 2-3. In 1986, a follow-up study reported that 42% of female federal workers had experienced sexual harassment within the two previous years. U.S. MERIT SYSTEMS PROTECTION BOARD, *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 2* (1988).

3. In the three months following the Clarence Thomas confirmation hearings, the Equal Employment Opportunity Commission (EEOC) reported a 70% increase in reports of sexual harassment, as compared to the previous year. Mike Feinsilber, *Impact Seen in Female Candidacies, Donations*, ROCKY MTN. NEWS, Apr. 28, 1992, at 2.

4. One judge from the United States Court of Appeals for the Ninth Circuit commented on the difficulties encountered by Anita Hill when she accused Clarence Thomas of sexual harassment.

Men fear that their "innocent flirtations" will one day land them in court with potentially devastating implications.⁵

Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions or privileges of employment, because of such individual's . . . sex."⁶ Two types of sexual harassment claims have emerged under Title VII — quid pro quo and hostile environment.⁷ Quid pro quo involves a demand for a sexual favor in exchange for an employment benefit or continued employment.⁸ Hostile environment sexual harassment is defined as unwelcome sexual conduct which affects a term, condition, or privilege of employment and may occur in a number of ways, including, but not limited to, "rape, pressure for sexual favors, sexual touching, suggestive looks or gestures, sexual joking or teasing and the display of unwanted sexual materials."⁹

Hostile environment sexual harassment is considered the more difficult of the two sexual harassment theories to prove,¹⁰ primarily because the employee may suffer no tangible economic injury.¹¹ Ad-

During the hearings, we heard more theories about why Anita Hill made her charges of sexual harassment than one would have thought it possible to conjure up. Among these were mental derangement, jealousy, disappointment over failure to obtain a promotion, anger that, as chairman of the EEOC, Clarence Thomas made decisions on the basis of political expediency rather than on the merits, resentment about his employment of lighter-skinned women and yes, always, the liberal conspiracy.

Hon. Stephen Reinhardt, *Forward* to BARBARA LINDEMANN, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* at v, xv-xvi (1992).

5. *Id.* at xvii. Judge Reinhardt noted "[o]ne obvious brooding omnipresence that affected the single-gender [Senate Judiciary] Committee was the 'there but for the grace of God go I' syndrome. . . . After all, some of what is classified as sexual harassment today was common practice less than a generation ago." *Id.*

6. 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII also prevents discrimination based on race, color, religion, or national origin. *Id.*

7. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 62 (1986) (stating that sexual harassment occurs in one of two ways: quid pro quo or hostile environment).

8. *Id.*

9. BARBARA LINDEMANN, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 5 (1992). Catharine MacKinnon has defined sexual harassment as the "unwanted imposition of sexual requirements in the context of a relationship of unequal power." MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 2, at 1.

10. Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 50 (1990).

11. *Id.* at 50-51. Despite the wide-spread belief that only quid pro quo sexual harassment victims suffer economic injury, a growing body of data has proven this to be false. Matthew C. Hesse & Lester J. Hubble, Note, *The Dehumanizing Puzzle of Sexual Harassment: A Survey of the Law Concerning Harassment of Women in the Workplace*, 24 WASHBURN L.J. 574, 575-76 n.9 (1985) (citing WORKING WOMEN'S INSTITUTE, *THE IMPACT OF SEXUAL HARASSMENT ON THE JOB: A PROFILE OF THE EXPERIENCES OF 92 WOMEN*, RESEARCH SERIES REPORT NO. 3 (1979)). Stud-

ditionally, men and women often disagree as to what constitutes offensive behavior in the work place.¹² Finally, the line between appropriate and inappropriate behavior may not be as clear as in quid pro quo harassment.¹³

In November of 1993, the United States Supreme Court confronted the issue of hostile environment sexual harassment in *Harris v. Forklift Systems*.¹⁴ Unfortunately, the decision did little to clarify the definition of a "hostile environment" or the type of behavior that may create one.¹⁵ The primary issue in *Harris* was whether a hostile environment sexual harassment claim could succeed absent severe psychological injury to the plaintiff.¹⁶ The Court declared that such a psychological injury is not a required element of a successful claim.¹⁷ Although the decision has been applauded as a victory for women,¹⁸ the Court left unresolved many important issues.¹⁹ The Court's failure to provide guidance in determining what type of behavior violates Title VII reinforces the lower courts' unfettered discretion to decide issues that primarily involve the credibility of the victim and personal biases of the factfinder.²⁰

ies demonstrate that 66% of women who are sexually harassed are either fired or pressured into resigning. *Id.* One study traced 81 cases of sexual harassment claims filed with the California Department of Fair Employment and Housing between 1979 and 1983. Frances S. Coles, *Forced to Quit: Sexual Harassment Complaints and Agency Response*, 14 SEX ROLES 81 (1986). Of those 81 women, almost one-half of the complainants were fired and another quarter quit from fear or frustration. *Id.* at 89. Moreover, Barbara Gutek found that over their lifetimes, more than 20% of women have either quit a job, been transferred, been fired, or quit applying for a job due to sexual harassment. GUTEK, *supra* note 2, at 58.

12. One extensive study found that 67% of men surveyed would be flattered if propositioned by a co-worker, as compared to only 17% of women. GUTEK, *supra*, note 2, at 96. Only 15% of the men would be insulted by the proposition, as compared to 63% of the women. *Id.* Finally, sexual touching was labeled sexual harassment by 84% of the women, and only 59% of the men. *Id.* at 43.

13. See *supra* note 12 (discussing the perspectives taken regarding acceptable or offensive behavior).

14. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

15. See *infra* notes 297-424 and accompanying text (discussing the issues *Harris* failed to address).

16. *Harris*, 114 S. Ct. at 370.

17. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious." *Id.* at 371 (citation omitted).

18. Linda P. Campbell, *Women Hail Sex Harassment Ruling*, CHI. TRIB., Nov. 10, 1993, § 1, at 1.

19. See *infra* notes 297-424 and accompanying text (discussing issues left unconsidered by the Court).

20. The Court's failure to address these issues in sexual harassment cases is particularly disturbing because women have traditionally encountered credibility problems within the legal system. See CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court* (1986) in FEMINISM UNMODIFIED 103, 110 (1987) [hereinafter, MACKINNON, *Sexual Harassment*] (discuss-

Despite the Supreme Court's decision in *Harris*, courts remain free to resist finding actionable hostile environment sexual harassment by adhering to strict formalities and by imposing stringent standards not required by statute. For example, although the Supreme Court stated, even prior to *Harris*, that no economic or tangible injury was necessary for a sexually harassing hostile environment to exist,²¹ some courts continued to demand an actual, demonstrable injury.²² In addition, because *Harris* failed to discuss the burden of demonstrating "unwelcomeness," courts may continue to demand exacting proof by the plaintiff that the harassment was not "welcome."²³ Finally, because *Harris* did not address the appropriate definition of "based on sex," courts may continue to defeat claims if the harassment cannot conform to a narrow definition of "based on sex."²⁴

This Comment examines whether these heightened standards of proof and injury manifest a judicial suspicion of women claiming

ing the acceptance of sexual harassment as a violation of the law and stating, "[o]ne dimension of this problem involves whether a woman who has been violated through sex has any credibility"); Pollack, *supra*, note 10, at 69 (stating that "[t]he overwhelming impression created by hostile work environment sexual harassment cases is that, regardless of the standard applied, women simply are not trusted"); Morrison Torrey, *When Will We Be Believed? Rape Myths and The Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025-31 (1991) (discussing myths which limit a victims credibility in rape prosecutions). See also 3A WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 924a, at 737 (Chadbourn rev. 1970) ("*No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician.*") (emphasis in original).

21. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) ("[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination.").

22. Most courts characterize this additional requirement as "severe psychological injury" or extreme anxiety or debilitation. See *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989) (stating that plaintiff must suffer anxiety and debilitation to prevail on hostile environment claim); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 619 (6th Cir. 1986) (requiring a showing of actual severe psychological injury to prevail on hostile environment claim), *cert. denied*, 481 U.S. 1041 (1987); *Scott v. Sears Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986) (requiring a showing that plaintiff suffered anxiety and debilitation by the harassing behavior in order to succeed on claim).

For the purposes of this Comment, the requirement of a heightened level of injury is referred to as "severe psychological injury." Some courts have not demanded a severe psychological injury, but nonetheless required an actual injury. See, e.g., *Andrews v. City of Phila.*, 895 F.2d 1469, 1482 (3d Cir. 1990) (holding that the plaintiff must demonstrate that she was actually injured to succeed); accord *Koster v. Chase Manhattan Bank*, 687 F. Supp. 848, 862 (S.D.N.Y. 1988).

23. See *supra* notes 194-234 and accompanying text (discussing cases in which the plaintiffs were unable to prove "unwelcomeness" despite explicit requests that the harassing behavior stop or complaints to management).

24. See *supra* notes 235-259 and accompanying text (discussing the different interpretations of "based on sex" and the problems encountered when a narrow definition is employed).

sexual harassment.²⁵ Requiring plaintiffs to fit into such rigid legal paradigms weeds out claims that judges may view as "unbelievable," "marginal," or "harmless."²⁶ This Comment argues that judges use these doctrines as proxies to deny claims they deem unjustified because of one of four misconceptions: 1) if a work environment is sexually charged, women assume the risk of sexual harassment by entering it;²⁷ 2) some women deserve and/or welcome sexual harassment;²⁸ 3) women complaining of sexual harassment are not credible;²⁹ or 4) men's "innocent flirting" will suddenly be-

25. One commentator noted that "[t]he ease with which plaintiffs may establish a prima facie case for other kinds of Title VII claims stands in stark contrast to the numerous and difficult hoops through which a potential plaintiff must jump to assert a claim of sexual harassment successfully." B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 3 (1993) (footnote omitted).

26. See *infra* notes 27-30 and accompanying text (discussing possible misconceptions or biases that function to defeat hostile environment sexual harassment claims).

27. See *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (stating that courts should consider "the lexicon of obscenity that pervaded the environment of the workplace" and the plaintiff's "reasonable expectation . . . upon voluntarily entering that environment in determining whether a Title VII violation occurred"), *cert. denied*, 481 U.S. 1041 (1987); *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1565 (M.D. Fla. 1990) (finding that requests made by a co-worker that the plaintiff "suck him" and "give him head" were "consistent with the general environment in the back shop" and therefore not violative of Title VII); *Reynolds v. Atlantic City Convention Ctr.*, 53 Fair Empl. Prac. Cas. (BNA) 1852, 1866 (D.N.J. May 21, 1990) (holding that the court "must discount the impact of these obscenities [directed at the plaintiff] in an atmosphere otherwise pervaded by obscenity . . . [because] [t]hese gestures and remarks were not made in church"), *aff'd mem.*, 925 F.2d 419 (3d Cir. 1991); *Ukarish v. Magnesium Elektron*, 31 Fair Empl. Prac. Cas. (BNA) 1315, 1321-22 (D.N.J. Mar. 1, 1983) (finding no Title VII violation because sexually oriented language was "customary plant language" and "no better or no worse" than it had been prior to the plaintiff's arrival); see also *Collins v. Pfizer, Inc.*, 39 Fair Empl. Prac. Cas. (BNA) 1316, 1330 (D. Conn. July 5, 1985) (holding that evidence that co-workers slapped plaintiff on the buttocks and encouraged her to grab the testicles of a supervisor is not actionable and merely "conduct not accepted in polite society"); *Halpert v. Wertheim & Co.*, 27 Fair Empl. Prac. Cas. (BNA) 21, 23-24 (S.D.N.Y. Aug. 26, 1980) (finding that the use of coarse sexual language was the "language of [the] market place" and therefore not sexual harassment).

28. See *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984) (finding that it was the plaintiff's personality that created the problems at work, not the sexual harassment); *Weinsheimer*, 754 F. Supp. at 1566 (finding that plaintiff's personal difficulties interfered with her work, not the crude working environment); *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419 (E.D. Mich. 1984) (finding that the plaintiff's workplace problems were the result of her personality, and not the vulgar language and sex oriented posters which permeated the work environment), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987); *Tindall v. Housing Auth.*, 55 Fair Empl. Prac. Cas. 22, 26 (W.D. Ark. Jan. 4, 1991) (finding that offensive conduct was not truly "unwelcomed" when the plaintiff "acted like 'one of the boys'"); *Dockter v. Rudolf Wolff Futures*, 684 F. Supp. 532, 533 (N.D. Ill. 1988) (finding that although the plaintiff explicitly rejected the defendant's repeated sexual advances she failed to show the conduct was "unwelcome"), *aff'd*, 913 F.2d 456 (7th Cir. 1990).

29. See, e.g., Pollack, *supra* note 10, at 52 ("[M]en have difficulty believing, or simply do not accept, women's versions of [sexual harassment]."); LINDEMANN, *supra* note 9, at 12 ("An addi-

come actionable as sexual harassment.³⁰ Specifically, this Comment analyzes decisions in those circuits which have traditionally resisted finding hostile environment sexual harassment and addresses the impact of *Harris* on those circuits. Finally, this Comment argues that *Harris's* elimination of the severe psychological injury requirement did not remedy the underlying misconceptions that act as a bar to many plaintiffs' claims.

Part I summarizes the evolution of Title VII that led to the recognition of sexual harassment by the courts. Part II discusses hostile environment sexual harassment opinions to demonstrate the problematic issues of standard of injury, "welcomeness," and "based on sex." Part III examines critically these opinions and demonstrates that *Harris* failed to address many of the unique problems facing sexual harassment plaintiffs.

I. BACKGROUND

A. *Title VII: The Prohibition of Discrimination*

Title VII was included in the Civil Rights Act of 1964.³¹ The intent of Title VII was to outlaw employment discrimination and create equal employment opportunities for minorities and women.³² In a landmark decision, *Griggs v. Duke Power Co.*,³³ the Supreme Court stated that the purpose of Title VII is "the removal of artificial, arbitrary and unnecessary barriers to employment when the

tional factor that has been suggested as inhibiting the recognition of sexual harassment as employment discrimination is the same male-harbored fear of false reporting that once led to testimonial disabilities placed on women in the prosecution of rape cases." For a discussion of credibility difficulties facing female victims of rape, see Torrey, *supra* note 20, at 1027-31.

30. See Pollack, *supra* note 10, at 52 (stating that "much of the behavior that women find offensive is behavior that is accepted as normal heterosexual behavior"). These misconceptions have been described as constituting an actual defense to sexual harassment. The defendant in a sexual harassment suit may either: 1) claim that the plaintiff encouraged or solicited the harassment (and therefore does not deserve a remedy); 2) deny the behavior altogether (implicating the victim's credibility); or 3) characterize the offensive behavior as trivial, common, or unharmed male behavior. George, *supra* note 25, at 18. Alternatively, the defendant may employ the "prevailing work environment" defense. See *supra* note 27 (discussing cases in which the plaintiff was denied relief because the work environment was crude before the plaintiff entered and therefore the defendant was not liable for a hostile environment).

31. The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241.

32. "The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

33. 401 U.S. 424 (1971).

barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.”³⁴ Recent court decisions have attributed to Congress this same intent to eliminate sexual harassment, stating that “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.”³⁵ Courts acknowledge that Congress intended to eradicate all types of sex discrimination, despite the unusual legislative history of Title VII.³⁶ When Title VII was originally introduced, it did not include a prohibition against sex discrimination.³⁷ The day before Congress was scheduled to vote on Title VII, a last minute amendment was offered that proposed “sex” as a protected category.³⁸ An opponent of the Civil Rights Act, Representative Howard Smith from Virginia, is said to have proposed the amendment adding “sex” to Title VII in an effort to defeat the entire bill.³⁹ Despite significant opposition, the amendment passed with a 168-133 margin.⁴⁰

Title VII was most recently amended by the Civil Rights Act of 1991.⁴¹ This Act will primarily affect sexual harassment litigation in two areas — damages available to plaintiffs and access to a jury trial.⁴² Prior to the Act, successful Title VII plaintiffs were limited

34. *Id.* at 431.

35. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

36. See *infra* notes 37-40 and accompanying text (discussing the legislative history of Title VII).

37. 110 CONG. REC. 1391, 2577-84 (1964).

38. *Id.* at 2577.

39. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 17 (1988) (“Smith hoped that by transforming the civil rights bill into a law guaranteeing women equal employment rights with men . . . the bill would become so controversial that it would fail . . .”).

40. 110 CONG. REC. 1391, 2584 (1964). Many Congressmen opposed the amendment. For example, Congressman Manny Celler, one of the sponsors of the Civil Rights Act, reacted to the amendment by stating, “[i]magine the upheaval that would result from adoption of blanket language requiring total equality. . . . What would become of traditional family relationships?” *Id.* at 2577. Congresswoman Katherine St. George responded that including “sex” as an actionable category would be “simply correcting something that goes back, frankly to the Dark Ages.” *Id.* at 2581. She declared that “[t]he addition of that little, terrifying word ‘s-e-x’ will not hurt this legislation in any way.” *Id.*

41. Civil Rights Act of 1991, 42 U.S.C. § 1981a (Supp. III 1991).

42. *Id.* § 1981a, §§ (a)(1), (b)(1), (c). Section (a)(1) provides “[i]n any action brought by a complaining party under . . . the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination, . . . the complaining party may recover compensatory and punitive damages.” *Id.* § 1981a(a)(1). Section (b)(1) provides: “[a] complaining party may recover punitive damages . . . against a respondent . . . if the complaining party demonstrates that

to equitable relief.⁴³ Under the 1991 Act, compensatory and punitive damages for intentional discrimination are available, as well as punitive damages for discrimination proven to be with "malice or reckless indifference to the federally protected rights of an aggrieved individual."⁴⁴ Additionally, in cases where compensatory or punitive damages are sought, either party may demand a jury trial.⁴⁵

B. Sexual Harassment As Sex Discrimination

Women originally used Title VII to gain access to male dominated jobs.⁴⁶ By successfully challenging employment practices that excluded, discouraged, or prejudiced female employees, women were able to enter some job markets previously closed to them by reducing instances of unfair treatment based on sexual stereotypes.⁴⁷ Courts refused, however, to recognize sexual harassment as a cause of action within the scope of Title VII.⁴⁸ Rather, they tended to relegate the problem of sexual harassment to the private sphere.⁴⁹ One court referred to sexually harassing behavior as a "personal proclivity," not attributable to "sex discrimination" but rather, to "satisfying a personal urge."⁵⁰ Another court stated that harassment

the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.* § 1981a(b)(1). Section (c) provides "[i]f a complaining party seeks compensatory or punitive damages . . . any party may demand a trial by jury." *Id.* § 1981a(c).

43. See *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 718 (1978) ("A court that finds unlawful discrimination may enjoin [the discrimination] . . . and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement . . . with or without backpay . . . or any other equitable relief as the court deems appropriate.") (internal quotations omitted). But see Sharon Bradford, Note, *Relief for Hostile Work Environment Discrimination: Restoring Title VII's Remedial Powers*, 99 YALE L.J. 1611, 1615-16 (1990) (arguing that Title VII, in its pre-1991 Civil Rights Act form allowed for compensatory damages but courts refused to grant such damages).

44. For the text of § 1981a(b)(1), see *supra* note 42.

45. For the text of § 1981a(c), see *supra* note 42. The Civil Rights Act is not applied retroactively. *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1488 (1994). Therefore, its impact on sexual harassment litigation remains uncertain.

46. Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 866 n.39 (1993).

47. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 332 (1977) (invalidating minimum height and weight requirements for correction facility positions); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (finding the employer's policy of refusing to hire women, but not men, with pre-school age children violated Title VII).

48. See LINDEMANN, *SUPRA* note 9, at 10 (stating that five of the first seven courts faced with the issue found that quid pro quo sexual harassment was not covered by Title VII).

49. MACKINNON, *Sexual Harassment*, *supra* note 20, at 110.

50. *Jane Corne v. Bausch & Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated and re-*

of the female plaintiff was not based on "sex," or sex discrimination, but on her refusal to *have* sex with a superior.⁵¹ Developments in the 1970's and early 1980's expanded the types of behavior prohibited by Title VII, eventually recognizing hostile environment sexual harassment as a legitimate cause of action.

1. *Development of Quid Pro Quo Sexual Harassment*

In 1976, the United States District Court for the District of Columbia, in *Williams v. Saxbe*,⁵² proclaimed that quid pro quo sexual harassment was actionable under Title VII.⁵³ In that case, the plaintiff was fired for refusing to have sex with her supervisor.⁵⁴ The court stated that Title VII's intent was to eradicate all forms of discrimination based on gender and therefore should encompass sexual harassment.⁵⁵ The court reasoned that if gender was the impetus for the negative treatment of an employee, then Title VII should apply.⁵⁶ This type of sexual harassment, characterized by a demand for sexual favors under the threat of termination or other detriment, became known as quid pro quo sexual harassment.⁵⁷

2. *Prohibition of a Discriminatory Hostile Environment*

Another development in Title VII jurisprudence occurred in the 1970's. Courts expanded the application of Title VII to cases of racial and ethnic discrimination created by a "hostile environment."⁵⁸

manded, 562 F.2d 55 (9th Cir. 1977).

51. *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. Aug. 9, 1974), *rev'd sub nom.* *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977).

52. 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds and remanded sub nom.* *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

53. *Id.* at 657.

54. *Id.*

55. *Id.* at 658. The court stated:

Congress's intent was not to limit the scope and effect of Title VII, but rather, to have it broadly construed. Furthermore, the plain meaning of the term 'sex discrimination' as used in the statute encompasses discrimination between genders whether the discrimination is the result of a well-recognized sex stereotype or for any other reason.

Id. (footnote omitted).

56. *Id.*

57. MacKinnon was the first to apply the term "quid pro quo" to sexual harassment cases in CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN*, *supra* note 2, at 32. "Women's experience of sexual harassment can be divided into two forms which merge at the edges and in the world. The first I term *quid pro quo*, in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity." *Id.*

58. *See, e.g., Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87, 88 (8th Cir. 1977) (holding that a pattern of derogatory ethnic and racial epithets may violate Title VII);

In *Rogers v. EEOC*,⁵⁹ the United States Court of Appeals for the Fifth Circuit found that the plaintiff stated a cause of action based on her employer's discriminatory practice of segregating patients by national origin.⁶⁰ Judge Goldberg, writing for the Fifth Circuit, stated that "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection."⁶¹ The court noted that Title VII's language:

evinces a Congressional intention to define discrimination in the broadest possible terms. . . . [T]he phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.⁶²

In describing the possible negative effects of working in a discriminatory hostile environment, the court posited, "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability" of workers under these conditions.⁶³ This language became the foundation for requiring a showing of severe psychological injury to succeed in a claim of hostile environment sexual harassment.⁶⁴

C. *The Development of Hostile Environment Sexual Harassment*

In 1980, prior to judicial recognition of a hostile environment cause of action under a sexual harassment theory, the Equal Employment Opportunity Commission (EEOC) promulgated Guide-

Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (finding that differential treatment of patients because of nationality created a hostile working environment in violation of Title VII), *cert. denied*, 406 U.S. 957 (1972). A hostile environment based on religious harassment is also recognized as being prohibited by Title VII. *See Weiss v. United States*, 595 F. Supp. 1050, 1056 (E.D. Va. 1984).

59. 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).

60. *Id.* at 238.

61. *Id.* at 237-38.

62. *Id.* at 238. The Fifth Circuit, in the *Rogers* decision, was credited as being the first court to recognize that a discriminatory hostile environment violates Title VII. *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) ("*Rogers v. EEOC* was apparently the first case to recognize a cause of action based upon a discriminatory work environment.") (citation omitted). *But see George, supra* note 25, at 9-10 & n.39 (arguing that only Justice Goldberg endorsed completely the theory that a discriminatory hostile environment violates Title VII).

63. *Rogers*, 454 F.2d at 238.

64. *See infra* note 279 (noting that this language in *Rogers* was mistakenly interpreted to require a successful sexual harassment plaintiff to show severe psychological injury).

lines that addressed sexual harassment.⁶⁵ The Guidelines anticipated hostile environment sexual harassment. Specifically, by extrapolating the developments in race and national origin discrimination to sex discrimination,⁶⁶ the Guidelines concluded that “[h]arassment on the basis of sex” and “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment” in violation of Title VII if such behavior “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”⁶⁷ In determining if sexual harassment is actionable, the Guidelines instruct courts to look at the totality of the circumstances.⁶⁸ Although the EEOC Guidelines do not have the force of law, they “constitute a body of experience

65. Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1992) [hereinafter, EEOC Guidelines]. The EEOC was created as the enforcement agency for Title VII. *Meritor*, 477 U.S. at 65.

The pertinent portion of the Guidelines state in full:

Sec. 1604.11. Sexual Harassment

(a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

EEOC Guideline, § 1604.11(a).

66. LINDEMANN, *supra* note 9, at 30 (noting that the EEOC borrowed from judicial authority finding racial and ethnic hostile environments discriminatory in promulgating the Guidelines).

67. EEOC Guidelines, *supra* note 65, § 1604.11(a). Hostile environment sexual harassment may resemble quid pro quo if the employee suffers an adverse employment decision at the hands of the harasser. *See generally* Carrero v. New York City Hous. Auth., 890 F.2d 569, 579 (2d Cir. 1989) (noting that quid pro quo and hostile environment claims are “not always clearly distinct and separate” and may actually complement each other). Generally, however, they differ in the following aspects: 1) quid pro quo requires harassment by a supervisor, whereas hostile environment includes harassment by coworkers or nonemployees; 2) hostile environment is not limited to sexual advances and can include general conduct of a nonsexual nature directed at complainant because of gender or sexual conduct not directed at complainant that nonetheless affects the working environment; 3) hostile environment claims do not require a tangible economic injury; and 4) in quid pro quo, employer’s liability is almost automatic, whereas in hostile environment it is decided on a case by case basis. LINDEMANN, *supra* note 9, at 158.

68. EEOC Guidelines, *supra* note 65, § 1604.11(b). This section states in full:

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

Id.

and informed judgment to which courts and litigants may properly resort for guidance."⁶⁹ Shortly after the Guidelines were published, the United States Court of Appeals for the District of Columbia ruled that hostile environment sexual harassment was actionable under Title VII in *Bundy v. Jackson*.⁷⁰

In *Bundy*, the plaintiff claimed that repeated sexual advances by several supervisors created a hostile environment in violation of Title VII.⁷¹ When she complained officially of the offensive conduct, her superior responded that "any man in his right mind would want to rape you."⁷² The district court denied relief stating that "the making of improper sexual advances to female employees [was] standard operating procedure, a fact of life, a normal condition of employment."⁷³ On appeal, the D.C. Circuit inferred that the lower court's decision was based on the plaintiff's lack of a tangible economic injury that accompanies quid pro quo claims.⁷⁴ Relying on *Rogers* and its progeny,⁷⁵ the D.C. Circuit determined that a hostile environment created by sexual harassment did indeed violate Title VII.⁷⁶ The court argued that the application of sexual harassment theory to hostile environment situations is necessary to prevent an employer from sexually harassing an employee "with impunity by carefully stopping short of firing the employee or taking any other tangible actions against her."⁷⁷ In support of its position, the court quoted from *Rogers*, reiterating that, "[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability" of the targeted workers.⁷⁸ Repetition of the "psychological stability" lan-

69. *Meritor Sav. Bank v. Vinson* 477 U.S. 57, 65 (1986) (internal quotations omitted).

70. 641 F.2d 934 (D.C. Cir. 1981).

71. *Id.* at 939-40.

72. *Id.* at 940.

73. *Id.* at 939 (quoting the district court).

74. *Id.* at 942.

75. *See, e.g.,* *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir.) (holding that segregated eating facilities created a discriminatory work environment in violation of Title VII), *cert. denied*, 434 U.S. 819 (1977); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 176 (D.C. Cir. 1976) (holding that repeated racial slurs created a discriminatory work environment); *United States v. City of Buffalo*, 457 F. Supp. 612, 631-35 (W.D.N.Y. 1978) (holding that the psychological impact on minority employees from work environment heavily charged with discrimination fell within the expansive Civil Rights Act language covering "terms, conditions or privileges").

76. *Bundy*, 641 F.2d at 943.

77. *Id.* at 945.

78. *Id.* at 944 (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

guage in both *Rogers*⁷⁹ and *Bundy*⁸⁰ laid the groundwork for subsequent courts to reinstate a tangible injury requirement — namely — proof of severe psychological injury.⁸¹

One year after the *Bundy* decision, the United States Court of Appeals for the Eleventh Circuit decided *Henson v. Dundee*,⁸² which later became an influential case in hostile environment sexual harassment jurisprudence.⁸³ In *Henson*, the Eleventh Circuit reversed the lower court's decision to deny liability because of a lack of tangible job detriment.⁸⁴ The *Henson* court reasoned that sexual harassment, like racial harassment was prohibited by Title VII and that "a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work . . . can be as demeaning and disconcerting as the harshest of racial epithets."⁸⁵

The *Henson* court enumerated five elements necessary for a successful claim of hostile environment sexual harassment.⁸⁶ First, the employee must be a member of a protected class.⁸⁷ Second, the conduct complained of must have been "unwelcomed" by the plaintiff.⁸⁸ Third, the harassment must be based on sex.⁸⁹ Fourth, the harass-

79. *Rogers*, 454 F.2d at 238.

80. *Bundy*, 641 F.2d at 944.

81. See *supra* note 22 (citing cases requiring the plaintiff to meet the severe psychological injury standard in order to succeed in a hostile environment sexual harassment suit); see also *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 459 (7th Cir. 1990) (considering whether the harassing behavior affected the plaintiff's well-being); *Yates v. Avco Corp.*, 819 F.2d 630, 633 (6th Cir. 1987) (holding that the plaintiff made out a prima facie case of sexual harassment when she showed, *inter alia*, that the harassment was sufficiently persistent and severe to affect her psychological well-being); *Highlander v. KFC Nat'l Management Co.*, 805 F.2d 644, 650 (6th Cir. 1986) (denying relief because the plaintiff was not psychologically injured).

The *Bundy* court makes note of the plaintiff's testimony that she endured psychological harm. *Bundy*, 641 F.2d at 942. It continues on to say, however, that an "employer can thus implicitly and effectively make the employee's endurance of sexual intimidation a 'condition' of her employment." *Id.* at 946.

82. 682 F.2d 897 (11th Cir. 1982).

83. See LINDEMANN, *supra* note 9, at 158 (discussing *Henson* as a leading sexual harassment case because *Henson* examines in depth the theories of hostile environment and quid pro quo sexual harassment).

84. *Henson*, 682 F.2d at 900-01.

85. *Id.* at 902.

86. *Id.* at 903-05.

87. *Id.* at 903.

88. *Id.*

89. *Id.* at 903-04. The requirement "based on sex" does not necessarily require the harassment to be a sexual proposition or even sexual in nature. LINDEMANN, *supra* note 9, at 172-74. For instance, vulgar language and pornographic displays can contribute to a hostile environment. See generally Morrison Torrey, *We Get the Message — Pornography in the Workplace*, 22 Sw. U. L.

ment must affect a "term, condition, or privilege" of employment.⁹⁰ Finally, respondeat superior must exist.⁹¹

The court elaborated on the second element, that of "unwelcomeness," stating that "this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."⁹² Explaining the third element, that the conduct was "based on sex," the court stated that a plaintiff must show, but for her sex, she would not have been subjected to the offensive behavior.⁹³ Furthermore, the court declared that conduct equally offensive to both men and women would not be "based on sex" within the meaning of Title VII.⁹⁴

In determining what type of behavior will satisfy the fourth element, that the harassment affect a term, condition or privilege of employment, the court noted that "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee does not affect the terms, conditions, or privileges of employment to a sufficiently significant degree to violate Title VII."⁹⁵ Rather, in order to state a claim for sexual harassment, the conduct "must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."⁹⁶ The court held that this standard is met if the conduct is "sufficiently severe and persistent

REV. 53 (1992) (discussing cases in which pornographic displays at work were part of a hostile environment). Some courts, however, strictly interpret this element and require that the harassment be "sexual" and directed at the plaintiff, as opposed to "based on sex." See *infra* notes 235-39 and accompanying text (discussing the possible interpretations of the "based on sex" element).

90. *Henson*, 682 F.2d at 904.

91. *Id.* at 905 (citing *Bundy v. Jackson*, 641 F.2d 934, 942-43 (D.C. Cir. 1981)). Respondeat superior requires that the employer knew or should have known about the sexual harassment and failed to take prompt action. *Id.* In *Meritor*, the Supreme Court failed to issue a definitive rule regarding employer liability. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69-73. For a detailed discussion of employer liability in sexual harassment suits, see David Holtzman & Eric Trelz, *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims After Meritor Savings Bank v. Vinson*, 31 ST. LOUIS U. L.J. 239 (1987); Lisa A. Blanchard, Note, *Sexual Harassment in the Workplace: Employer Liability for a Sexually Hostile Environment*, 66 WASH. U. L.Q. 91 (1988); Gayle Ecabert, Comment, *An Employer's Guide to Understanding Liability for Sexual Harassment Under Title VII: Meritor Savings Bank v. Vinson*, 55 U. CIN. L. REV. 1181 (1987).

92. *Henson*, 682 F.2d at 903.

93. *Id.* at 904.

94. *Id.*

95. *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

96. *Id.*

to affect seriously the psychological well being of employees."⁹⁷ In this respect, the court deviated from the EEOC Guidelines which require only that the "conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating [a hostile] . . . environment."⁹⁸ Notably, however, the *Henson* court did not purport to require actual injury, only the possibility of such injury.⁹⁹

The 1980's proved confusing for sexual harassment plaintiffs and defendants.¹⁰⁰ Courts used various tests for establishing hostile environment sexual harassment, and some courts refused to recognize it as a legitimate cause of action.¹⁰¹ Even those courts declaring that hostile environment sexual harassment was a legitimate cause of action held plaintiffs to extremely high standards. For example, in *Bohen v. City of East Chicago*,¹⁰² the plaintiff was employed as a dispatcher for the fire department.¹⁰³ During her course of employment, she was repeatedly subjected to sexually explicit and demeaning behavior.¹⁰⁴ The plaintiff reported this behavior to her superiors on numerous occasions, but no action was taken to correct the problem.¹⁰⁵ Eventually, the plaintiff was fired.¹⁰⁶

Judge Easterbrook, of the United States Court of Appeals for the

97. *Id.*

98. EEOC Guidelines, *supra* note 65, § 1604.11(a)(3).

99. See LINDEMANN, *supra* note 9, at 176 n.63 (stating that the language of *Henson* "suggests complainant need not wait for harm").

100. See *infra* notes 101-260 and accompanying text (discussing cases which applied varying standards of injury and proof in sexual harassment suits).

101. See, e.g., *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1411 (10th Cir. 1987) (noting that the lower court failed to consider whether a hostile environment cause of action existed, concentrating only on whether quid pro quo sexual harassment was present); *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 42-43 (D.D.C. Feb. 26, 1980) (stating that no violation occurred despite evidence of a hostile environment), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd and remanded sub nom. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

102. 622 F. Supp. 1234 (N.D. Ind. 1985), *aff'd in part, rev'd in part*, 799 F.2d 1180, 1181 (7th Cir. 1986).

103. *Id.*

104. The court noted the following:

[A co-worker] would spread his legs while sitting at the console so that [plaintiff] could not move without touching him. When [the co-worker] was standing, he would rub his pelvis against her rear. He insisted that she not close the door of the bathroom when using it. . . . Once she had to fight [the co-worker] off with a clipboard while trying to dispatch some equipment to a fire. When [the co-worker] spoke to her, the talk was entirely about sexual matters — in what positions he liked to have sexual relations, how [plaintiff] should comport herself, and so on.

Id. at 1238.

105. *Id.*

106. *Id.* at 1237.

Seventh Circuit, sitting by designation on the district court, found no actionable sexual harassment under Title VII or the equal protection clause.¹⁰⁷ Judge Easterbrook found that one of the plaintiff's supervisors had engaged in behavior such as grabbing the plaintiff's crotch, rubbing his pelvis against her buttocks, and applying constant pressure for sexual acquiescence.¹⁰⁸ The court also found that another of the plaintiff's supervisors had made a "veiled threat of rape"¹⁰⁹ and that the "conversation in the fire station was filled with lurid sexual descriptions."¹¹⁰ Moreover, the court found that "[the plaintiff] suffered humiliation, anguish, and the costs of two brief stays in the hospital."¹¹¹ Based on these facts, however, Judge Easterbrook declined to decide whether this level of harassment rose to a violation of Title VII.¹¹² Rather, he found that even if this were actionable sexual harassment, the plaintiff was fired "for cause" because she was a "complainer," "obnoxious," and "nosy."¹¹³ *Bohen* illustrated the need for Supreme Court elaboration on the necessary elements of an actionable sexual harassment claim. In 1986 the Supreme Court heard its first case addressing hostile environment sexual harassment, *Meritor Savings Bank v. Vinson*.¹¹⁴

II. FROM *Meritor* to *Harris*

A. *Meritor Savings Bank v. Vinson*

In *Meritor*, the plaintiff Vinson filed a claim of sexual harassment against her employer, Meritor Savings Bank and her supervisor, Sidney Taylor.¹¹⁵ Vinson alleged that the defendant Taylor repeatedly demanded sexual favors, fondled her in front of other employees, followed her into the women's restroom, and exposed himself to her.¹¹⁶ Moreover, Vinson testified that the defendant coerced her

107. *Id.* Because Bohen was employed by the state, she also brought an equal protection claim. *Id.*

108. *Id.* at 1238.

109. *Id.* One captain stated that Bohen needed someone "to drag her into the bushes for a good fuck." *Id.*

110. *Id.* at 1240.

111. *Id.* at 1238.

112. *Id.* at 1244.

113. *Id.* at 1241. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the Title VII count and reversed the equal protection count. *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986).

114. 477 U.S. 57 (1986).

115. *Id.* at 60.

116. *Id.*

into having intercourse approximately 40 or 50 times and that he forcibly raped her on several occasions.¹¹⁷

The district court denied relief finding that if, in fact, there was a sexual relationship between Vinson and her supervisor, it was "voluntary."¹¹⁸ The United States Court of Appeals for the District of Columbia reversed.¹¹⁹ The Supreme Court unanimously affirmed the appellate court.¹²⁰ In doing so, the Court speculated that the district court may have denied relief because it erroneously believed "that a claim for sexual harassment [would] not lie absent an *economic* effect on the complainant's employment."¹²¹ The Supreme Court stated that a sexually charged hostile environment may indeed violate Title VII, even absent an economic injury.¹²²

By examining the language of Title VII the Court concluded that Title VII "is not limited to 'economic' or 'tangible' discrimination."¹²³ Rather, it "evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."¹²⁴ The Court bolstered its decision by looking to the EEOC Guidelines which "fully support the view that harassment leading to noneconomic injury can violate Title VII."¹²⁵

The Court stated that "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."¹²⁶ It determined that the district court's focus on whether Vinson's sexual acquiescence was "voluntary" was misguided.¹²⁷ Rather, the Court stated, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"¹²⁸ In determining "welcome-

117. *Id.*

118. *Vinson v. Taylor*, 23 Fair Empl. Prac. Cas. (BNA) 37, 42 (D.D.C. Feb. 26, 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd and remanded sub nom. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

119. *Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd and remanded sub nom. Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 58 (1986).

120. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

121. *Id.* at 67-68.

122. *Id.* at 64.

123. *Id.*

124. *Id.* (citations omitted).

125. *Id.* at 65. The Court acknowledged that the Guidelines do not have the force of law but they "do constitute a body of experience and informed judgement to which courts and litigants may properly resort for guidance." *Id.* (internal quotations omitted).

126. *Id.* at 64.

127. *Id.* at 68.

128. *Id.* (citing EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985)).

ness," the Court stated that "the correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome."¹²⁹

The Court then examined two standards for determining what type of conduct creates a hostile environment that would violate Title VII.¹³⁰ First, the Court cited the standard recommended by the EEOC Guidelines for evaluating whether harassing conduct is actionable — namely, whether the conduct unreasonably interferes with the plaintiff's work performance or creates a hostile or offensive environment.¹³¹ The Court appeared to ratify this test by stating that "the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."¹³²

Although seeming to endorse the EEOC standard, the Court nonetheless continued to enunciate another, more strict, standard.¹³³ First, it noted that not all sexual harassment violates Title VII.¹³⁴ Specifically, the Court stated that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹³⁵ Under this standard, the harassing conduct must be severe or pervasive enough to actually "alter" the employee's work conditions, as opposed to merely "interfering" with the plaintiff's work performance, as required under the EEOC stan-

129. *Id.*

130. *Id.*

131. *Id.* at 65; *see also* EEOC Guidelines, *supra* note 65, § 1604.11(a). The first prong of the EEOC test states that unwelcome sexual conduct is actionable if "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance." *Id.* § 1604.11(a)(3). The second prong of the EEOC test creates an alternative means to finding actionable sexual harassment if the harasser's behavior creates "an intimidating, hostile, or offensive working environment." *Id.* Therefore, under the EEOC standard, sexual harassment is actionable under two conditions: if the harassing conduct has the purpose or effect of interfering with the plaintiff's work performance; or if the conduct creates a hostile or offensive working environment. *Id.*

132. *Meritor*, 477 U.S. at 65; *see* *Ellison v. Brady*, 924 F.2d 872, 876 (9th Cir. 1991) ("The Supreme Court in *Meritor* explained that courts may properly look to guidelines issued by the [EEOC] for guidance when examining hostile environment claims of sexual harassment.").

133. *Meritor*, 477 U.S. at 67.

134. *Id.* "[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII." *Id.* The Court states that a "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to sufficiently significant degree to violate Title VII." *Id.* (internal quotations omitted).

135. *Id.* (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

dard.¹³⁶ Therefore, the plaintiff would prevail only if she demonstrated that the harassing conduct was severe or pervasive enough to alter her working conditions *and* create a hostile environment.¹³⁷

Adding to the subsequent confusion by lower courts as to the appropriate standard to apply in these types of cases, the *Meritor* Court quoted the *Rogers* court.¹³⁸ Discussing the development of hostile environment cases and the reasons that they violate Title VII, the Court noted that “[o]ne can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability” of employees under such conditions.¹³⁹ Although the Court elaborated on the elements necessary to prove a hostile environment sexual harassment claim, the nebulous terms “unwelcome,” “based on sex,” and “severe and pervasive” continued to defy definition.

B. Standard of Injury

Predictably, lower courts interpreted the meaning of *Meritor* in a number of ways.¹⁴⁰ Although the courts differed as to whether to apply the EEOC or the *Henson* standard, the more controversial issue was whether Title VII required a hostile environment sexual harassment claimant to suffer psychological injury in order to win her claim.¹⁴¹ The Sixth Circuit’s decision in *Rabidue v. Osceola*¹⁴²

136. See Pollack, *supra* note 10, at 60 (discussing the difference between the EEOC standard and the *Meritor* standard and arguing that *Meritor* accepted the more restrictive standard). But see *Ellison*, 924 F.2d at 877 (stating “[w]e do not think that these standards are inconsistent”).

137. *Meritor*, 477 U.S. at 67.

138. *Id.* at 66.

139. *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

140. See, e.g., *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1522-23 (M.D. Fla. 1991) (stating that *Meritor* and Title VII can prohibit sexually explicit materials in the workplace). *Contra Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986) (stating that sexually explicit materials are not outlawed under Title VII), *cert. denied*, 481 U.S. 1041 (1987). See also *Ellison*, 924 F.2d at 877-78 (rejecting idea that *Meritor* requires a plaintiff to suffer severe psychological injury to succeed). *Contra Scott v. Sears Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986) (stating that *Meritor* requires a plaintiff to suffer anxiety and debilitation in order to succeed in a hostile environment case).

141. See *Dockter v. Rudolf Wolff Futures*, 913 F.2d 456, 459 (7th Cir. 1990) (requiring plaintiff to have suffered a severe negative effect on his or her well-being to succeed in hostile environment claim); *accord Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989); *Yates v. Avco Corp.*, 819 F.2d 630, 633 (6th Cir. 1987); see also *Highlander v. KFC Nat’l Management Co.*, 805 F.2d 644, 650 (6th Cir. 1986) (denying relief because plaintiff was not psychologically injured); *accord Rabidue*, 805 F.2d at 619; *Scott*, 798 F.2d at 213. But see *Ellison*, 924 F.2d at 878 (expressly declining to require severe psychological injury to succeed in claim).

142. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041

illustrates the impact of requiring severe psychological injury in order for a claimant to succeed.¹⁴³

1. Requiring Severe Psychological Injury: Rabidue v. Osceola

In *Rabidue*, the plaintiff filed suit claiming, *inter alia*, hostile environment sexual harassment.¹⁴⁴ Rabidue alleged that she was subject to discriminatory treatment which created a hostile environment because of her sex.¹⁴⁵ Being the only woman in a managerial position in the office, she was subject to comments such as "we really need a man on that job," regularly excluded from activities for men only, and denied benefits allotted to the male managers.¹⁴⁶ In addition to her complaints of disparate treatment by her superiors, one of Rabidue's coworkers, Douglas Henry, was especially vulgar and offensive.¹⁴⁷ Henry regularly referred to women as "whores," and "cunt[s]," and used other sexist expletives such as "pussy," and "tits."¹⁴⁸ In reference to Rabidue, Henry stated "[a]ll that bitch needs is a good lay."¹⁴⁹ Moreover, the common work areas displayed pornography featuring naked or partially naked women.¹⁵⁰ Rabidue filed several written complaints about Henry's behavior but no action was taken to rectify the situation.¹⁵¹ Rabidue was eventually fired, ostensibly for her irascible and opinionated personality and her inability to work harmoniously with co-workers and customers.¹⁵²

The lower court denied relief because the employer met its burden of articulating a nondiscriminatory reason for Rabidue's discharge.¹⁵³ Namely, that she had an antagonistic personality.¹⁵⁴ Ad-

(1987).

143. *Id.*

144. *Id.* at 614.

145. *Id.*

146. *Id.* at 624 (Keith, C.J., concurring in part & dissenting in part).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* One of the posters which remained on the wall for eight years showed a prone woman with a golf ball on her breasts. A man was standing over her yelling "fore" and preparing to take a swing. *Id.*

151. *Id.* In addition, she organized at least one meeting with other female employees to discuss Henry's offensive behavior. *Id.*

152. *Id.* at 615.

153. *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 423 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

154. *Id.*

ditionally, the court stated that the offensive language and posters did not create a hostile environment which rose to the level of actionable sexual harassment.¹⁵⁵

The United States Court of Appeals for the Sixth Circuit affirmed the lower court decision, reiterating that Rabidue's discharge did not "evinced an anti-female animus."¹⁵⁶ For this type of action to be successful, the court stated that the harassing behavior must have unreasonably interfered with the plaintiff's work and created an "intimidating, hostile or offensive working environment that affected seriously the psychological [sic] well-being of the plaintiff."¹⁵⁷ In explaining this criterion of injury, the court noted that the standard is both objective and subjective.¹⁵⁸

First, the conduct must rise to the level of interfering with the reasonable person's work performance and severely affect the psychological health of the reasonable person.¹⁵⁹ If this requirement is satisfied, the harassing conduct must actually have interfered with the plaintiff's work performance, and inflicted a severe psychological injury.¹⁶⁰

The court stated that an evaluation of these criteria required examining the background and experiences of the plaintiff, her supervisors and coworkers, as well as "the lexicon of obscenity that pervaded the environment of the workplace . . . and [plaintiff's] reasonable expectation . . . upon voluntarily entering that environment."¹⁶¹ The court asserted that any outcome would depend on the "personality of the plaintiff."¹⁶² The court stated that although Henry's language may have been annoying, it could not have se-

155. *Id.* The court concluded that "the vulgar language and sex oriented posters did not interfere with [Rabidue's] work performance." *Id.* Rather, the court stated that "[Rabidue's] work problems resulted from her temper and stubbornness." *Id.*

156. *Rabidue*, 805 F.2d at 618.

157. *Id.* at 619. The court never explicitly stated from where it drew this standard, stating only that "[a]fter having considered the EEOC guidelines and after having canvassed existing legal precedent," severe psychological injury is required for a plaintiff to prevail in a Title VII hostile environment sexual harassment claim. *Id.*

158. *Id.* at 620.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* The Sixth Circuit described Rabidue as a "capable, independent, ambitious, aggressive, intractable, and opinionated individual." *Id.* at 615. It also noted that "[t]he plaintiff's supervisors and co-employees with whom plaintiff interacted almost uniformly found her to be an abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible personality." *Id.*

verely affected Rabidue's psychological well being.¹⁶³ Moreover, the pornographic posters had only "de minimis" effect "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places."¹⁶⁴ Hence, offensive conduct and displays that do not inflict serious psychological injury on the plaintiff were not actionable as sexual harassment under the *Rabidue* standard.¹⁶⁵

After *Rabidue*, the United States Courts of Appeals for the Sixth, Seventh, and Eleventh Circuits issued opinions that required this additional showing of severe psychological injury in hostile environment cases.¹⁶⁶ Other circuits have required a showing of an "actual injury" for a plaintiff to succeed.¹⁶⁷

2. Authority Rejecting Severe Psychological Injury Requirement

The Ninth Circuit and the EEOC have specifically rejected the *Rabidue* standard of severe psychological injury.¹⁶⁸ Other circuits, while not addressing the issue specifically, have not explicitly required a showing of severe psychological injury.¹⁶⁹

163. *Id.* at 622. ("In the case at bar, the record effectively disclosed that Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees.").

164. *Id.*

165. *Id.*

166. *See, e.g.,* Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1561 (11th Cir. 1987) (requiring plaintiff to demonstrate severe psychological injury); Yates v. Avco Corp., 819 F.2d 630, 633 (6th Cir. 1987) (upholding claim where plaintiff showed that harassment was severe enough to affect her psychological well-being); Scott v. Sears Roebuck & Co., 798 F.2d 210, 214 (7th Cir. 1986) (holding that plaintiff cannot succeed absent a showing of psychological debilitation). Although the Eleventh Circuit requires that the harassment "affect seriously the victim's psychological well-being" to be actionable, the plaintiff's burden is less exacting in this circuit; *see also* Sparks, 830 F.2d at 1561 (stating that the fact that plaintiff was "upset" met the severe psychological injury requirement).

167. *See supra* note 22 (citing cases in which the court required some actual injury to the plaintiff in order for her to succeed).

168. *See* Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991) (expressly declining to apply the *Rabidue* standard); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT, 8 FAIR EMPL. PRAC. MAN. (BNA) 405: 6681, 6690 n.20 (March, 19, 1990) [hereinafter EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT] (expressly rejecting the *Rabidue* standard).

169. *See, e.g.,* Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992) (requiring that plaintiff show she belongs to a protected group, that she was subject to unwelcome sexual harassment, that the harassment was based on sex, that the harassment affected a term of employment, and that the employer knew or should have known of the harassment and failed to take proper action, but not requiring psychological injury); *accord* Carrero v. NY City Hous. Auth. 890 F.2d 569, 577-78 (2d Cir. 1989); *see also* Bennett v. Corroon & Black Corp., 845 F.2d

a. Equal Employment Opportunity Commission

In 1990 the EEOC issued the EEOC Policy Guidance on Current Issues of Sexual Harassment.¹⁷⁰ In discussing the method for determining if an environment is hostile, the EEOC noted that the Sixth Circuit requires severe psychological injury as an element of stating a claim.¹⁷¹ The EEOC stated, however, that "it is the Commission's position that it is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the work environment of a reasonable person."¹⁷² The leading case explicitly rejecting the *Rabidue* standard is *Ellison v. Brady*.¹⁷³

b. *Ellison v. Brady*

In *Ellison*, the plaintiff filed a claim of sexual harassment based on a hostile environment against her employer, the Internal Revenue Service (IRS).¹⁷⁴ She charged that her co-worker, Gray, sexually harassed her by repeatedly asking her out and sending her strange letters.¹⁷⁵ The letters implied an intimacy which was imagined on the part of Gray and frightening to Ellison.¹⁷⁶ One letter stated in part "I know you are worth knowing with or without sex."¹⁷⁷ The letter went on to state, "[d]on't you think it odd that two people who have never even talked together, alone, are striking off such

104, 106 (5th Cir. 1988) (requiring that the sexual harassment be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive environment, but not requiring psychological injury); accord *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1413 (10th Cir. 1987).

170. EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT, *supra* note 168, at 6690 n.20.

171. *Id.*

172. *Id.* The EEOC also addresses other aspects of the *Rabidue* decision.

The reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of 'girlie' pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant.

Id.

For a discussion of whose perspective should be used in evaluating these claims, see generally Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1406-11 (1992); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1216-19 (1990); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1202 (1989).

173. 924 F.2d 872 (9th Cir. 1991).

174. *Id.* at 873.

175. *Id.* at 873-74.

176. *Id.*

177. *Id.* at 874.

intense sparks."¹⁷⁸ Another letter stated "I cried over you last night and I'm totally drained today. I have never been in such constant term oil (sic). . . . I could not stand to feel your hatred for another day."¹⁷⁹ After receiving the propositions and the letters, Ellison testified she was frightened because she "thought he was crazy" and "didn't know what he would do next."¹⁸⁰ She notified her supervisor of the incidents and requested that either she or Gray be transferred.¹⁸¹ Although Gray was initially transferred to a nearby office, he arranged through union arbitration to return six months later.¹⁸² Upon his return, Ellison filed sexual harassment charges.¹⁸³

The United States Court of Appeals for the Ninth Circuit reversed the district court's grant of summary judgement to the defendant.¹⁸⁴ The appellate court reasoned that the Supreme Court in *Meritor* implicitly adopted the EEOC standard of injury.¹⁸⁵ While acknowledging that *Meritor* also adopted the limiting language in *Rogers*, the Court stated that these standards are not inconsistent.¹⁸⁶ In addressing the defendant's request that it adopt the *Rabidue* standard, the court responded, "[w]e do not agree with the standards set forth in . . . *Rabidue*, and we choose not to follow [that decision]."¹⁸⁷

The Ninth Circuit opinion points out that the *Rabidue* requirement for severe psychological injury does not follow from the standard set out in *Meritor*.¹⁸⁸ In addressing the "severe or pervasive" aspect of the *Meritor* test,¹⁸⁹ the court stresses that it is the conduct

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* When Ellison told her supervisor of Gray's strange conduct, the supervisor responded, "[T]his is sexual harassment." *Id.*

182. *Id.*

183. *Id.* at 874-75.

184. *Id.* at 872.

185. *Id.* at 877.

186. *Id.* at 876 ("The Supreme Court drew its limiting language from *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972).").

187. *Id.* at 877.

188. *Id.* at 877-78. The court also noted that *Rogers* did not require severe psychological injury. It explained that the *Rogers* court was merely illustrating what could happen in a hostile environment when it stated "[o]ne can readily envision working environments so heavily polluted . . . to destroy completely the emotional and psychological stability of minority group workers." *Id.* at 878 n.8 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972))). Finally, the Court stated that the *Rogers* court "did not hold that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed." *Id.*

189. *Meritor*, 477 U.S. at 67 ("For sexual harassment to be actionable, it must be sufficiently

of the harasser that must be severe or pervasive, not the affect on the harassed employee.¹⁹⁰ The opinion states that "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."¹⁹¹ Consequently, the Ninth Circuit did not require the plaintiff to meet a psychological injury threshold and instead examined the conduct of the harasser to determine its potential to alter the working conditions of the plaintiff.¹⁹²

C. Other Difficult Elements in Sexual Harassment Cases

In addition to the conflict over whether or not severe psychological injury is a necessary element to succeed in a hostile environment sexual harassment suit, courts also grapple with other undefined elements of sexual harassment.¹⁹³ The next section discusses two vague concepts of sexual harassment jurisprudence: the definition of "unwelcome" behavior and the definition of "based on sex."

1. Welcomeness

To qualify as actionable sexual harassment, courts require that the behavior complained of by the plaintiff be "unwelcome."¹⁹⁴ For example, the *Meritor* Court declared that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"¹⁹⁵ The Court noted that "whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact."¹⁹⁶ The Court placed the burden of showing unwelcomeness on the plaintiff.¹⁹⁷ Questions arise as to what degree a plaintiff must demonstrate the unwelcomeness of the harassing behavior, what type of behavior may be considered presumptively unwelcome, and whether participation in some type of sexual behavior by the plain-

severe or pervasive to alter the conditions of [the victim's] employment") (internal quotations omitted).

190. *Ellison*, 924 F.2d at 878.

191. *Id.*

192. *Id.*

193. See *infra* notes 194-259 and accompanying text (discussing the difficulties of defining and applying the concepts of "welcomeness" and "based on sex").

194. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

195. *Id.*

196. *Id.*

197. *Id.*

tiff constitutes welcomeness to *all* types of sexual behavior. In determining welcomeness, *Meritor* instructed courts to consider the plaintiff's manner of dress and public expressions.¹⁹⁸ In addition, courts typically consider the overall atmosphere of the work environment, the plaintiff's participation or contribution to such an atmosphere, and whether the plaintiff affirmatively verbalized that the offensive behavior was *not* welcome.¹⁹⁹ The following cases demonstrate the difficulties of determining whether offensive behavior is actually "welcome."

a. *Weinsheimer v. Rockwell International Corporation*²⁰⁰

In *Weinsheimer*, the plaintiff sued her employer for maintaining a hostile work environment.²⁰¹ She was one of several employees who worked in what was referred to as the "back shop."²⁰² The plaintiff testified that she was subjected to weekly requests by a co-worker to "suck him" or "give him head," a request to "[g]ive [him] some of that stuff," as well as being grabbed by him in the breast and genital areas.²⁰³ The same co-worker held a knife to the plaintiff's throat, shoved her into a filing cabinet, and threatened to "bang her head into the ground."²⁰⁴ Another co-worker placed his exposed penis in the plaintiff's hand while she was looking away.²⁰⁵ In addition, the plaintiff testified that a supervisor patted her on the rear and requested oral sex.²⁰⁶ Although the plaintiff reported a number of these incidents, no investigation was undertaken until she left Rockwell on medical leave.²⁰⁷

The court found that "[i]t is likely that a number of the incidents claimed by [the plaintiff] did take place" and that the work environment at Rockwell was "characterized by an atmosphere of vulgarity

198. *Id.* at 69.

199. See *infra* notes 200-34 and accompanying text (discussing cases in which courts consider these issues in order to determine whether the offensive conduct was welcome).

200. 754 F. Supp. 1559 (M.D. Fla. 1990).

201. *Id.*

202. *Id.* at 1560.

203. *Id.* at 1561.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 1561-62. Weinsheimer took medical leave as a result of the aforementioned events. *Id.* The leave was granted based on a letter from Weinsheimer's psychologist in which he diagnosed Weinsheimer as suffering from "industrial trauma," with such symptoms as depression, anxiety, and sleep disturbances. *Id.*

and sexual innuendo.”²⁰⁸ However, the court also determined that the plaintiff participated in the sexually explicit discussions at work and therefore could not show that “the majority of such conduct [was] truly ‘unwelcome’ or ‘hostile.’”²⁰⁹ Although the plaintiff attempted to refute this finding as evidenced by her frequent complaints, her supervisors testified, and the court accepted, that these complaints were not taken to be sexual harassment complaints.²¹⁰ Instead, they were found to center on “general morale, supervisory and disciplinary problems in the back shop.”²¹¹ Furthermore, complaints of specific sexual harassment incidents were reported several months after the fact.²¹² Hence, the court determined that when an offensive work environment is prevalent, and the plaintiff participates in such an environment, then any derogatory or offensive behavior directed towards her cannot be deemed “unwelcomed” for the purposes of Title VII.²¹³

b. *Dockter v. Rudolf Wolff Futures*²¹⁴

In *Dockter*, the plaintiff sued her employer for sexual harassment based on her supervisor’s sexual propositions and touchings.²¹⁵ The district court found that although many of the sexual overtures and acts alleged did occur, they did not rise to the level of actionable sexual harassment.²¹⁶ The United States Court of Appeals for the Seventh Circuit affirmed the lower court on different grounds.²¹⁷

Dockter was hired by James Gannon who became her immediate supervisor.²¹⁸ During her first few weeks of employment, Gannon

208. *Id.* at 1563.

209. *Id.* at 1564.

210. *Id.*

211. *Id.*

212. *Id.* To buttress their decision, the court also found that the offensive behavior inflicted upon the plaintiff was not due to her sex, but rather, a result of her confrontational and abusive personality. *Id.* at 1565. In addition, the severity of the behavior complained of was “consistent with the general environment in the back shop,” “commonplace” and “routine,” therefore not sufficiently severe or pervasive to rise to the level of sexual harassment. *Id.* Although noting that the plaintiff did suffer psychological injury, the court concluded that this injury was the result of plaintiff’s “personal difficulties” and not the result of her work environment. *Id.* at 1566.

213. *See id.* at 1563-64 (finding that although the atmosphere was crude and vulgar, the plaintiff could not prove that the offensive conduct was unwelcomed because of her own participation in the atmosphere).

214. 684 F. Supp. 532 (N.D. Ill. 1988), *aff’d*, 913 F.2d 456 (7th Cir. 1990).

215. *Id.*

216. *Id.* at 535.

217. *Dockter v. Rudolf Wolff Futures*, 913 F.2d 456 (7th Cir. 1990).

218. *Dockter*, 684 F. Supp. at 533.

made several sexual overtures towards Dockter — including touching her hair, grabbing her from behind, boasting of his sexual talents, calling her at home, insisting she join him for supposed business meals, and several attempts to kiss her.²¹⁹ One of the attempts to kiss her was accompanied by a grabbing of her breast.²²⁰ All of Gannon's overtures were explicitly rejected by Dockter.²²¹ After the final incident, which involved Gannon's grabbing her breast, Gannon stopped the harassment.²²² Nine weeks later Dockter was fired.²²³

The district court found that this behavior did not rise to the level of actionable sexual harassment.²²⁴ In denying her claim, the court addressed the welcomeness issue stating "[a]lthough Plaintiff rejected these efforts, her initial rejections were neither unpleasant nor unambiguous, and gave [the defendant] no reason to believe that his moves were unwelcome."²²⁵ It further stated that "[a]fter one misguided act, in which he briefly fondled Plaintiff's breast and was reprimanded by her for doing so, he accepted his defeat and terminated all such conduct."²²⁶ According to the court, even explicit, verbal rejections directed at the offender may not be sufficient evidence to prove "unwelcomeness."²²⁷

These two cases demonstrate the difficulty facing sexual harass-

219. *Dockter*, 913 F.2d at 459-60.

220. *Id.*

221. *Dockter*, 684 F. Supp at 533.

222. *Id.*

223. *Id.* at 534.

224. *Id.* at 535.

225. *Id.* at 533.

226. *Id.*

227. *Id.* Although the Seventh Circuit did not address directly the "welcomeness" issue, it denied her claim on other grounds. *Dockter v. Rudolf Wolff*, 913 F.2d 456, 462 (7th Cir. 1990). Specifically, the court found that the plaintiff was fired because of her "attitude and inability to carry out the tasks [she was] assigned." *Id.* at 458. It noted that "even if her initial two-weeks were 'hostile' such as to be actionable under Title VII," because she was fired for other reasons, she had no remedy. *Id.* at 461. (emphasis added).

The court rejected the plaintiff's assertions that she was relegated to inferior work assignments and denied training due to her rejection of Gannon. *Id.* The plaintiff asserted that the training would have allowed her to keep her position. The court found that "the only job she performed . . . during her three months of employment was to try to become proficient on the IBM personal computer — a job which she did not perform adequately." *Id.* at 462. Furthermore, the court noted that "[w]ith regard to the [training program], it is undisputed that [the defendant] paid for the course and that [the plaintiff] did begin this training, but was required to 'drop out' because her schedule at work became too busy." *Id.* These inconsistent findings were used by the court as evidence that the plaintiff's rejection of Gannon was not related to her inability to receive the training she was promised. *Id.*

ment plaintiffs when attempting to establish "unwelcomeness."²²⁸ First, *Weinsheimer* illustrates that if a work environment is generally vulgar, then the plaintiff may be held to a higher standard of demonstrating the "unwelcomeness" of the offensive behavior.²²⁹ This is especially true when the plaintiff uses vulgar or sexually explicit language herself.²³⁰ Second, *Weinsheimer* implicates the idea of presumptively unwelcome behavior.²³¹ Some of the behavior complained of, such as being shoved into a filing cabinet, being threatened with a knife, or having an exposed penis placed in one's hand may be considered presumptively unwelcome.²³² Third, a plaintiff's prompt complaint, or lack thereof, regarding the offensive behavior impacts the welcomeness analysis.²³³ As seen in both *Weinsheimer* and *Dockter*, however, a complaint or explicit verbal rejection may not be sufficient to prove unwelcomeness.²³⁴

2. Based on Sex: *Reynolds v. Atlantic City Convention Center*²³⁵

Although the requirement that the sexually harassing behavior be "based on sex" appears at first glance to be straightforward, courts interpret this requirement in a variety of ways.²³⁶ Those courts adopting a narrow definition of this element require that the behav-

228. See *infra* notes 229-34 and accompanying text (discussing the barriers plaintiffs may encounter in attempting to prove the complained of behavior was unwelcome).

229. *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990).

230. *Id.*

231. See Childers, *supra* note 46, at 862 n.29 (discussing the unwelcomeness requirement and proposing that sexually aggressive conduct be presumed unwelcome unless otherwise indicated).

232. *Id.*

233. See text accompanying notes 210, 227 (noting that the courts in *Weinsheimer* and *Dockter* discounted the impact of the plaintiffs' complaints of sexual harassment).

234. *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (stating that the plaintiff's complaints were not perceived as complaints of sexual harassment); *Dockter v. Rudolf Wolff Futures*, 684 F. Supp. 532, 533 (N.D. Ill. 1988) (stating that an explicit rejection of the defendant's propositions does not demonstrate "unwelcomeness"), *aff'd*, 913 F.2d 456 (7th Cir. 1990).

235. 53 Fair Empl. Prac. Cas. (BNA) 1852 (D.N.J. May 21, 1990).

236. See *infra* notes 237-39 and accompanying text (discussing different courts' interpretations of the "based on sex" requirement). The different interpretations appear to be the result of the EEOC Guidelines. The Guidelines note that "[h]arassment on the basis of sex is a violation of . . . title VII." EEOC Guidelines, *supra* note 65, § 1604.11(a). In describing sexual harassment, however, the Guidelines state sexual harassment is unwelcome "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* The EEOC, however, has clarified the possible conflict by stating "the Commission notes that sex-based harassment — that is, harassment not involving sexual activity or language — may also give rise to . . . liability . . . if it is . . . directed at employees because of their sex." EEOC POLICY GUIDANCE ON SEXUAL HARASSMENT, *supra* note 168, at 405: 6692.

ior be sexual in nature, consisting of sexual propositions or touchings.²³⁷ A more expansive definition also includes nonsexual conduct directed at the plaintiff because of her gender as satisfying the "based on sex" requirement.²³⁸ Finally, some courts may find sexual conduct not specifically directed at the plaintiff that nonetheless affects the working atmosphere to be "based on sex."²³⁹ It is the first, narrow definition that is examined here.

In *Reynolds*, the plaintiff Reynolds sued her employer and union for, *inter alia*, hostile environment sexual harassment.²⁴⁰ Reynolds had worked as an electrician at the Convention Center in two capacities: as a regular electrician and as a subforeman (supervisor).²⁴¹ She was the only female subforeman.²⁴² Reynolds was the subject of derogatory names and actions, especially when she functioned in her supervisory role.²⁴³ The crew of seventeen, in which she was a supervisor was fired en masse on a day she was not present.²⁴⁴ The defendants claimed that the firing occurred because of their desire to fire the head foreman (who had appointed Reynolds as subforeman), and therefore they dismissed the entire crew.²⁴⁵ The following day seven members of the dismissed crew were reassigned to the Convention Center.²⁴⁶ Two days later, there were twelve electricians working at the Convention Center.²⁴⁷ The defendants admitted that the mass firing was not "business as usual."²⁴⁸

Prior to being discharged, the plaintiff was subject to verbal abuse and obscene gestures, including getting the "finger," having a co-

237. See *infra* notes 240-59 (discussing *Reynolds* and the court's use of a narrow definition of "based on sex").

238. See, e.g., *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (noting that any harassment, even if nonsexual in nature, could violate Title VII if it was due to the employee's gender).

239. See, e.g., *Andrews v. City of Phila.*, 895 F.2d 1469, 1485-86 (3d Cir. 1990) (noting that "obscene language and pornography quite possibly could be regarded as 'highly offensive to a woman who seeks to deal with her fellow employees and clients with professional dignity and without the barrier of sexual differentiation and abuse'" and therefore may create a hostile environment in violation of Title VII) (quoting *Bennett v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988)).

240. *Reynolds v. Atlantic City Convention Ctr.*, 53 Fair Empl. Prac. Cas. (BNA) 1852, 1853 (D.N.J. May 21, 1990).

241. *Id.*

242. *Id.*

243. *Id.* at 1855-56.

244. *Id.* at 1857.

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 1859.

worker grab and shake his genitals at the plaintiff, and being referred to as "cunt" and "douche bag cunt."²⁴⁹ When Reynolds was being considered as subforeman, the business manager at the union stated "now is not the time, the place or the year [for a] woman foreman."²⁵⁰ Some male employees refused to work for her when she acted as subforeman.²⁵¹ Others threatened to quit or did quit rather than work for her.²⁵² During the Miss America beauty pageant, an exhibitor requested that she and the other female electrician not be permitted on the floor and the work was subsequently given to male co-workers.²⁵³ On one occasion, while she and another female employee were moving heavy boxes, her male co-workers "stood around laughing and making jokes rather than help them."²⁵⁴

In denying Reynold's claim, the court noted that the workplace was "pervaded by a lexicon of obscenity."²⁵⁵ Citing to *Rabidue*, the court concluded that "we must discount the impact of those obscenities in an atmosphere otherwise pervaded by obscenity. These gestures and remarks were not made in church."²⁵⁶ Hence, the court found these comments did not rise to the level of "pervasive."²⁵⁷

In addressing the other behavior complained of, the court stated that the incidents involving refusals to work, the beauty pageant, or refusals to assist did not constitute acts of a sexual nature, and therefore were irrelevant to the Title VII claim.²⁵⁸ It noted that while these "acts do not reflect a strong spirit of cooperation between the male and female electricians at the Convention Center," they also do not fall into the prohibited category of acts of a "sexual nature" — hence, they were not factored into her Title VII claim.²⁵⁹

It is clear from these cases that courts apply differing standards and definitions of elements in deciding sexual harassment cases. The

249. *Id.* at 1856.

250. *Id.* at 1863.

251. *Id.* at 1856.

252. *Id.*

253. *Id.* at 1857.

254. *Id.*

255. *Id.* at 1866.

256. *Id.*

257. *Id.*

258. *Id.* at 1867.

259. *Id.* As for the comment made by the union representative, that it was not the time, place, or year for a woman foreman, the court stated that this could be proof that they opposed a woman subforeman, but that there was no causation between that remark and Reynolds firing. *Id.*

concepts of "based on sex" and "welcomeness" were applied in a non-uniform manner and often were the deciding factors in a particular case. It was the split in circuits over the severe psychological injury requirement, however, that prompted the Supreme Court to grant certiorari in *Harris v. Forklift Systems*.²⁶⁰

D. THE SUPREME COURT REVISITED: HARRIS V. FORKLIFT SYSTEMS

In *Harris*, the plaintiff sued her employer Hardy, charging hostile environment sexual harassment.²⁶¹ A Magistrate was assigned the case and the district court adopted the Magistrate's report.²⁶² The district court found that although the defendant's conduct was offensive to Harris and would offend the reasonable person, it nonetheless was not actionable because it could not have seriously injured Harris' psychological well-being.²⁶³

The defendant's offensive statements included telling Harris, the sole female manager, "[y]ou are a dumb ass woman," "[y]ou are a woman, what do you know," "[w]e need a man [for Harris'] position," "[l]et's go to the Holiday Inn to negotiate your raise," as well as other lewd remarks.²⁶⁴ In addition, the defendant asked Harris to retrieve coins from his front pockets, dropped objects on the floor and asked her to pick them up, and made suggestive remarks about her clothing.²⁶⁵ The defendant made many of these statements and requests repeatedly and in the presence of other employees.²⁶⁶ Harris confronted the defendant about his offensive behavior and expressed her intent to resign.²⁶⁷ At that time, the defendant apologized and promised to refrain from further offensive comment.²⁶⁸ Based upon his promise, Harris remained at Forklift.²⁶⁹ A few weeks later, however, the defendant asked Harris if she had secured

260. *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993), *rev'd and remanded*, 114 S. Ct. 367 (1993).

261. *Id.* at *1.

262. *Id.*

263. *Id.* at *7.

264. *Id.* at *2.

265. *Id.* at *3.

266. *Id.* at *2. At least one comment, the one regarding the Holiday Inn, was made in front of a client. *Id.*

267. *Id.* at *3.

268. *Id.*

269. *Id.*

an account by promising to have sex with the customer.²⁷⁰ Shortly thereafter, Harris resigned and filed a sexual harassment claim.²⁷¹

Although the district court found that the defendant was "vulgar" and "demean[ed] the female employees,"²⁷² it concluded that his behavior could not have affected Harris' psychological well-being,²⁷³ despite her testimony to the contrary.²⁷⁴ Dismissing the defendant's comments as "annoying," "insensitive," and "inane," although also "truly gross and offensive," the court denied recovery because it did not believe Harris was truly injured by the conduct.²⁷⁵ Bolstering this conclusion was that some of the female clerical employees testified that they were not offended by the defendant.²⁷⁶ The Court of Appeals for the Sixth Circuit affirmed in a brief, unpublished opinion.²⁷⁷

In an opinion by Justice O'Connor, the Supreme Court reversed and remanded the case, declaring that severe psychological injury is not required to prove a sexual harassment hostile environment claim.²⁷⁸ The Court noted that neither *Meritor*, nor the language of Title VII, justified this heightened standard of injury.²⁷⁹ The Court reaffirmed the *Meritor* standard requiring that behavior be "sufficiently severe or persuasive to alter the conditions of the victim's employment and create an abusive working environment" in order to violate Title VII.²⁸⁰ In determining whether this standard is met,

270. *Id.*

271. *Id.*

272. *Id.* at *5.

273. *Id.* at *7.

274. *Id.* at *3. Harris testified that by August of 1987, "she was experiencing anxiety and emotional upset because of Hardy's behavior." *Id.* She also stated that "[s]he did not want to go to work; she cried frequently and began drinking heavily; and her relationship with her children became strained". *Id.*

275. *Id.* at *6-7.

276. *Id.* at *3. The court noted that "Ms. Hicks [a former receptionist] jauntily testified, 'lots of people make comments about my breasts.'" *Id.* Although the district court recognized that Harris, as the only female manager, may have been more offended than a clerical employee, it nonetheless attributed great weight to the testimony that other female employees were not offended. *Id.*

277. *Harris v. Forklift Sys., Inc.*, 976 F.2d 733 (6th Cir. 1992), *rev'd and remanded*, 114 S. Ct. 367 (1993).

278. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

279. *Id.* at 371. The Court notes that "the reference in [*Meritor*] to environments 'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' merely present[s] [an] especially egregious example[] of harassment. [It] does not mark the boundary of what is actionable." *Id.* (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

280. *Id.* at 370 (quoting *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)) (internal quota-

the Court instructed lower courts to look to the totality of the circumstances, including 1) the frequency of the offensive conduct; 2) its severity; 3) whether the conduct is physically threatening or humiliating, as contrasted with "a mere offensive utterance;" and 4) whether the behavior unreasonably interferes with the plaintiff's work performance.²⁸¹ The Court acknowledged that although psychological injury would be relevant to proving a claim, it is not required.²⁸² Moreover, the Court stated that this is not "a mathematically precise test" and can only be applied "by looking at all the circumstances."²⁸³

In clarifying the *Meritor* standard, the Court made clear that an abusive environment is in itself an unreasonable interference with the victim's employment.²⁸⁴ This interpretation differs from the literal reading of *Meritor* which required a plaintiff to satisfy independently the requirements of "unreasonable interference" and an abusive working environment.²⁸⁵ The Court emphasized the subjective and objective components of this test — both the reasonable person and the victim must perceive the environment as abusive.²⁸⁶

Finally, the Court reiterated that no tangible injury of any sort is necessary to succeed in a hostile environment claim.²⁸⁷ The Court stated that sexual harassment "can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers," but none of these tangible injuries is necessary.²⁸⁸

Justices Ginsburg and Scalia both filed concurring opinions.²⁸⁹ Justice Scalia objected to the vagueness of the standard and suggested that requiring unreasonable interference with the employee's actual job performance might provide greater guidance for lower courts.²⁹⁰ He ultimately concurred in the majority's standard be-

tions omitted).

281. *Id.* at 371.

282. *Id.*

283. *Id.*

284. *Id.* "[If] the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin [it] offends Title VII's broad rule of workplace equality." *Id.*

285. See *supra* notes 133-37 and accompanying text (discussing the standard set forth in *Meritor*).

286. *Harris*, 114 S. Ct. at 370.

287. *Id.* at 371.

288. *Id.*

289. *Id.* at 372 (Scalia, J., concurring) (Ginsburg, J., concurring).

290. *Id.* (Scalia, J., concurring). Justice Scalia suggested "job performance" as a substitute for

cause there was no statutory authority for his proposed standard, which would require a demonstrable decline in a plaintiff's work performance.²⁹¹

Justice Ginsburg also advocated a slightly different standard.²⁹² She stated that the language of Title VII indicates that "[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."²⁹³ She too advocated focusing the inquiry on the plaintiff's work performance.²⁹⁴ However, Justice Ginsburg's proposed standard would not require the plaintiff's productivity to actually decline to prove an unreasonable interference, but only that the harassing conduct made "it more difficult to do the job."²⁹⁵

Although this result is considered a victory for women,²⁹⁶ the standard remains inherently vague. The potential for conflicting interpretations is present under the *Harris* decision, as it was under *Meritor*.

III. ANALYSIS — UNRESOLVED ISSUES AFTER *HARRIS* V. FORKLIFT SYSTEMS

As stated earlier, prior to the *Harris* decision, the federal courts of appeals differed over the standard of injury required to succeed in sexual harassment claims.²⁹⁷ This was demonstrated by the circuit split over the severe psychological injury standard.²⁹⁸ Although the *Harris* decision resolved that particular issue, it did little to clarify

"terms, conditions, or privileges of employment" as stated in Title VII. *Id.* Although this standard may resemble the "unreasonable interference" with the work performance proffered by the EEOC, it actually would use an "interference with job performance" as its sole measure of an abusive environment. The EEOC recognizes "unreasonable interference with job performance" and the creation of an abusive environment as two separate foundations for violating Title VII. See *supra* note 65 and accompanying text (stating EEOC Guidelines requirements). Justice Scalia's suggestion of using "performance" as the sole criterion, and requiring an actual decline, would obviously narrow the scope of Title VII.

291. *Harris*, 114 S. Ct. at 372 (Scalia, J., concurring).

292. *Id.* (Ginsburg, J., concurring).

293. *Id.*

294. *Id.*

295. *Id.* This test differs from Justice Scalia's in that it uses exposure to a disadvantageous term, condition, or privilege as a basis for demonstrating interference with the plaintiff's work performance. *Id.*

296. Campbell, *supra* note 18, at 1. (describing *Harris* decision as a victory for women).

297. See *infra* note 298 and accompanying text (describing the conflict).

298. See *supra* notes 140-97 and accompanying text (describing the circuit split over whether severe psychological injury was a necessary component of a successful suit).

what exactly creates a hostile environment. In effect, the decision permits judges to continue to create standards that reflect their personal biases.²⁹⁹ Those courts which have resisted finding actionable sexual harassment will be permitted to continue denying claims, despite their inability to require severe psychological injury. By examining the language and tone of these courts' decisions, it becomes apparent that the severe psychological injury requirement, as well as strict definitions of "based on sex" and questionable "welcomeness" analyses were often used as proxies for underlying factors operating against sexual harassment plaintiffs.³⁰⁰

Many sexual harassment hostile environment opinions indicate that certain factors act to undermine the claims of plaintiffs. These factors appear as recurring themes in some jurisdictions. The first theme common to several sexual harassment opinions is that if the work environment was hostile to women prior to the plaintiff's employment, she assumed the risk of harassment and is therefore barred from suing.³⁰¹ A second theme that prejudices many sexual harassment decisions is that some women, because of a personality flaw, do not deserve protection from sexual harassment, or alternatively, because of some characteristic the plaintiff possesses, she is not truly injured by sexual harassment.³⁰² The third factor that defeats many sexual harassment plaintiffs' claims, is the presumption that the plaintiffs are not credible.³⁰³ Although it is the duty of all factfinders to judge the credibility of parties to a suit, many sexual harassment opinions appear to presume the plaintiff is lying, despite evidence to the contrary.³⁰⁴ The fourth and final theme that is

299. Justice Scalia noted: "As a practical matter, today's holding lets virtually unguided juries [or judges] decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages." *Harris*, 114 S. Ct. at 372 (Scalia, J., concurring) (alteration in original).

300. See *supra* notes 301-424 and accompanying text (discussing the possible biases that act as a bar to plaintiffs' claims).

301. See *supra* notes 306-22 and accompanying text (discussing cases in which courts allowed the prevailing work environment defense to defeat plaintiffs' claims).

302. See *supra* notes 323-66 and accompanying text (discussing cases in which the court used an aspect of the plaintiffs' personalities to help defeat their claims). These two factors are really different sides of the same coin. On the one hand, a plaintiff's personality is such that she "deserves" any harassment she encounters, or conversely, her personality indicates that she is not really offended by any type of harassment. In either situation, the plaintiff loses because she possesses some characteristic not liked by the factfinder, regardless and in spite of a defendant's harassing behavior.

303. See *infra* notes 367-404 and accompanying text (discussing cases in which the courts unfairly discredit the plaintiffs in order to help defeat their claims).

304. See *infra* notes 376-404 and accompanying text (discussing cases in which the court dis-

fatal to many sexual harassment claims is the assumption that behavior which qualifies as sexual harassment is common male behavior and therefore cannot or should not be outlawed by Title VII.³⁰⁵ A closer examination of the cases discussed in Part II illustrates these points. This section demonstrates that unreasonable standards of proof or injury required to succeed in a sexual harassment claim are merely reflections of biases or misperceptions of the factfinder.

A. "Prevailing Work Environment" and Assumption of Risk

Some courts refuse to grant relief to plaintiffs who voluntarily enter a work environment that is hostile to women because of the "prevailing work environment" defense.³⁰⁶ This defense presumes that a woman assumes the risk of sexual harassment if a sexually hostile environment existed prior to the woman's entry.³⁰⁷ Perhaps the most illustrative example of the "prevailing work environment" defense appears in the Sixth Circuit's opinion in *Rabidue v. Osceola*.³⁰⁸ The court listed several factors to consider in deciding whether or not a hostile environment exists, including "the lexicon of obscenity that pervaded the [work] environment . . . coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment."³⁰⁹ According to the *Rabidue* court, if the plaintiff voluntarily entered a crude and vulgar workplace, she could not expect it to change as the result of her presence. In other words, she knew what to expect, therefore she must accept the consequences. As Catharine MacKinnon notes, "[i]f the pervasiveness of

counts evidence of the defendants' lack of credibility).

305. See *infra* notes 405-24 and accompanying text (discussing opinions that illustrate this theme).

306. See *supra* note 27 (citing cases in which plaintiffs' claims were defeated because they entered a vulgar or crude work environment voluntarily).

307. See *supra* note 27 (listing cases where courts considered a woman's "assumption of risk" in entering the workplace).

308. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

309. *Id.* at 620. Although it would be comforting to dismiss the *Rabidue* decision as an aberration in sexual harassment jurisprudence, it would be inaccurate. Indeed, the *Harris* district court decision made favorable reference to *Rabidue* and even used the *Rabidue* standard as a point of comparison for the *Harris* decision. *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444, at *7-8 (M.D. Tenn. 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd and remanded*, 114 S. Ct. 367 (1993). The court noted "[i]t is helpful to compare the instant case to *Rabidue*, wherein the Sixth Circuit [found] the plaintiff was not the victim of a hostile work environment." *Id.* It notes that the Sixth Circuit requires "sexual harassment more egregious" than that present in *Rabidue* and would hence require more in the present case. *Id.*

an abuse makes it nonactionable, no inequality sufficiently institutionalized . . . would be actionable."³¹⁰ In response to the *Rabidue* majority's statement that the "presence of actionable sexual harassment would be different depending upon the prevailing work environment,"³¹¹ the *Rabidue* dissent argues convincingly that an employer who maintained "an anti-semitic workforce and tolerate[d] . . . 'kike' jokes, displays of Nazi literature and anti-Jewish conversation" would not escape Title VII scrutiny under a "prevailing work environment" defense.³¹²

Nonetheless, some jurisdictions recognize the "prevailing work environment" as a defense to a sexual harassment charge.³¹³ The district court in *Harris* appeared to adopt this approach. The court noted that the defendant's "sexual comments were just part of the joking work environment" to support its rejection of Harris' claim.³¹⁴ Similarly, in *Reynolds v. Atlantic City Convention Center*, the court declared that in an environment permeated with vulgarity, any obscenity directed at the plaintiff would be "discount[ed]" because the remarks "were not made in church."³¹⁵ This finding, in conjunction with its narrow definition of what behavior was "based on sex," permitted the court to deny Reynold's claim.³¹⁶ Simultaneously, the court sanctioned the maintenance of a vulgar work environment.³¹⁷

The Supreme Court failed to expressly address this issue in the *Harris* opinion.³¹⁸ In fact, it may have implicitly, albeit unknowingly, endorsed the "prevailing work environment" theory by stating

310. MACKINNON, *Sexual Harassment*, *supra* note 20, at 115.

311. *Rabidue*, 805 F.2d at 620.

312. *Id.* at 626 (Keith, C.J., concurring in part & dissenting in part).

313. *See supra* note 27 (listing cases in which courts considered the "prevailing work environment"). Many courts have explicitly rejected this notion. *See e.g.*, Sparks v. Pilot Freight Carriers, 830 F.2d 1554, 1561 n.13 (11th Cir. 1989) (stating that the whole point of sexual harassment law is to prevent abusive behavior in the workplace that is arguably acceptable in other contexts); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1525-27 (M.D. Fla. 1991) (stating that the "prevailing work environment" defense is inconsistent with the intent of Title VII); Bennett v. New York City Dep't of Corrections, 705 F. Supp. 979, 986 (S.D.N.Y. 1989) (noting that simply because prisons are crude and rowdy "does not mean that anything goes").

314. *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444 at *3 (M.D. Tenn. 1991), *aff'd*, No. 91-5301, 976 F.2d 733 (6th Cir. 1992), *rev'd and remanded*, 114 S. Ct. 367 (1993).

315. *Reynolds v. Atlantic City Convention Ctr.*, 53 Fair Empl. Prac. Cas. (BNA) 1852, 1866 (D.N.J. May 21, 1990). Reynolds was one of only two female employees, and both testified that the name calling and vulgarity insulted them. *Id.*

316. *Id.*

317. *Id.*

318. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

that a hostile environment cannot be adjudged without examining "all the circumstances."³¹⁹ Arguably, this could authorize a court's use of the "prevailing work environment" defense, hence excusing otherwise actionable behavior.³²⁰

The notion that the "prevailing work environment" trumps an individual's Title VII rights defeats the purpose of Title VII³²¹ and appears to be reserved exclusively for sexual harassment plaintiffs.³²² The obvious difficulty with this approach is that it insulates from Title VII scrutiny those environments most manifestly hostile towards women. In direct opposition to the purposes of Title VII, this doctrine maintains the status quo at the expense of women entering work environments catering exclusively to the sexual norms of men.

B. The Personality Problems

Some courts also rely on a plaintiff's personality to deny an otherwise valid sexual harassment claim or to bolster a dubious decision to refuse relief.³²³ Reliance on a personality trait to deny relief usually appears in one of two ways. First, if a plaintiff does not fit the stereotypical "helpless," "fearful" victim and is instead aggressive or uncooperative, some courts dismiss sexual harassment of the plaintiff as either deserved retribution for a troublesome employee or as merely annoying conduct, not injurious to the plaintiff.³²⁴ The plaintiff's personality is also used to determine whether the sexual harassment was "welcomed" by the plaintiff. Here, courts examine the plaintiff's attire, speech, and any so called "provocative" behavior that could indicate that she "asked" to be sexually harassed.³²⁵ Although the inquiry into "welcomeness" of sexual attention is in

319. *Id.* at 371.

320. *See id.* (discussing language in *Harris* that could be interpreted in this manner).

321. *See supra* notes 31-34 and accompanying text (discussing the intent of Title VII).

322. *See Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986) (Keith, C.J., concurring in part & dissenting in part) (arguing that an environment hostile to a particular race would not be precluded from Title VII scrutiny under a prevailing environment theory), *cert. denied*, 481 U.S. 1041 (1987).

323. *See infra* notes 324-66 and accompanying text (discussing cases in which courts use some aspect of the plaintiffs' personalities or behavior to defeat their claims).

324. *See, e.g., Rabidue*, 805 F.2d at 615, 622 (finding that 1) the plaintiff was fired because she was rude and uncooperative and 2) the harassment was merely annoying).

325. *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986) (stating that inquiry into a complainant's dress and speech is "obviously relevant").

some cases appropriate,³²⁶ it can also be used as a tool to blame women for unwanted sexual attention.³²⁷ Both uses of a plaintiff's personality shifts the court's inquiry away from the unlawful behavior of the defendant, and focuses instead on what the plaintiff may have done to ask for it.

1. *She Deserved It Because . . .*

When the Sixth Circuit declared in *Rabidue* that an examination of the "background and experience of the plaintiff" was a necessary consideration in determining whether a hostile environment exists, it authorized courts to scrutinize every facet of a plaintiff's personality.³²⁸ In doing so, it legitimized a court's use of a plaintiff's personality as relevant to the claim of sexual harassment.³²⁹ The logical conclusion of this line of reasoning is that some plaintiffs do not deserve protection from harassment because they are "aggressive," "intractable" or "opinionated,"³³⁰ or conversely, as a result of these characteristics, these plaintiffs were not really injured.³³¹ At a mini-

326. Welcomeness is relevant in the sense that if the behavior is truly welcomed, then it does not qualify as sexual harassment. EEOC Guidelines, *supra* note 65 (defining sexual harassment as unwelcome sexual conduct). This issue is over emphasized by many courts. Usually, the only time "welcomeness" would be a legitimate issue is when a court is questioning a plaintiff's receptiveness to the sexual propositions or touches. See, e.g., *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990) (finding that the "plaintiff's willing and frequent involvement in the sexual innuendo prevalent in her work area indicate that she did not find the majority of such conduct truly 'unwelcome' or 'hostile'" and therefore her suit failed). Consequently, if the court deems that the sexual attacks were welcomed, then it implicitly states that the plaintiff is filing a false claim. Although this is usually not explicitly stated, it follows that the issue of welcomeness is usually moot unless one assumes the plaintiff is lying.

327. See *infra* notes 342-57 and accompanying text (discussing cases in which courts misuse the welcomeness inquiry in order to defeat the plaintiffs' claims).

328. *Rabidue*, 805 F.2d at 620.

329. In addition, the court encourages the examination of the backgrounds of the plaintiff's co-workers and supervisors. *Id.* This apparently would establish different standards for different environments depending on the social or economic background of a plaintiff's co-workers. It would also excuse more behavior from certain classes of people. For example, certain behavior in a professional atmosphere may be sexual harassment, but it would not be sexual harassment in a blue collar setting. The *Rabidue* dissent points out that "[n]o court analyzes the background and experience of a supervisor who refuses to promote black employees before finding actionable race discrimination under Title VII." *Id.* at 627 (Keith, C.J., concurring in part & dissenting in part).

330. These were adjectives used by the Sixth Circuit to describe *Rabidue*. *Id.* at 615.

331. See, e.g., *Tindall v. Housing Auth.*, 55 Fair Empl. Prac. Cas. (BNA) 22, 26 (W.D. Ark. Jan. 4, 1991) (noting that the plaintiff was not truly offended where she "acted like 'one of the boys'"); *Ukarish v. Magnesium Elektron*, 31 Fair Empl. Prac. Cas. 1315, 1319 (D.N.J. Mar. 1, 1983) (stating that although the plaintiff was subjectively offended by vulgar conduct she appeared to accept it because she "joined in it as one of the boys" and therefore her claims are not actionable).

mum, this personality inquiry often serves to discredit, embarrass, or deter sexual harassment plaintiffs.³³²

*Bohen v. City of East Chicago*³³³ demonstrates a court's willingness to use a plaintiff's personality to deny her sexual harassment claim.³³⁴ In denying the plaintiff's claim, the court noted that "almost from the day she joined the department Bohan was a complainer whose deportment became more and more obnoxious."³³⁵ The court also notes that "[s]hortly after joining the department, Bohan was assigned to work [the midnight shift] with Joseph Creviston [T]he first night she worked with Creviston she took a short nap and awoke . . . to find Creviston's hand pressed against her crotch."³³⁶ Bohan complained to her supervisor about this and other such incidents, but no action was ever taken.³³⁷ To characterize Bohan as a complainer ignores the reality of her situation.

Next, the court dismisses out of hand the possibility that the harassment caused Bohan to be "obnoxious."³³⁸ Although an expert testified as to some of the effects of sexual harassment, such as tension and anxiety, Judge Easterbrook stated: "'Experts' on this subject know no more than judges about what causes mental changes —

332. Once again, the *Rabidue* decision itself is a conspicuous example of using the plaintiff's personality as an excuse for denying her claim. *Rabidue*, 805 F.2d at 612. The Sixth Circuit's opinion elaborated on Rabidue's various personality traits, stating that she was "abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible." *Id.* at 615. Simultaneously, the court considered Mr. Henry's anti-female epithets and comments such as "[a]ll that bitch needs is a good lay" as merely "annoying." *Id.* at 622, 624. The court appeared to empathize with the defendant's need to fire Rabidue and ignored the incongruity of the defendant's actions — firing Rabidue, while only offering "a little fatherly advice" to Henry. *Id.* at 624.

The *Rabidue* district court was even more direct about using Rabidue's personality to deny her claim, stating that "the vulgar language and sex oriented posters did not interfere with [Rabidue's] work performance. [Rabidue's] work problems resulted from her temper and stubbornness." *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 432 (E.D. Mich. 1984), *aff'd*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1986). As the court of appeals' dissent notes, however, even if Rabidue did possess negative personality traits, "[t]hese traits [would not] justify the sex-based disparate treatment" she encountered. *Rabidue*, 805 F.2d at 624 (Keith, C.J., concurring in part & dissenting in part). Both *Rabidue* opinions ignore the inevitable interaction between Henry's vulgar and insulting behavior and Rabidue's inability to work harmoniously with her co-workers. Consequently, the courts opined that Rabidue's problematic personality was unrelated to and independent of her work environment, and therefore her claim was denied. 333. 622 F. Supp. 1234 (N.D. Ind. 1985), *aff'd in part, rev'd in part*, 799 F.2d 1180 (7th Cir. 1986).

334. *Id.*

335. *Id.* at 1241.

336. *Id.* at 1237-38.

337. *Id.* at 1238.

338. *Id.* at 1243.

which is to say that they know almost nothing."³³⁹

Judge Easterbrook found that Bohen was the "victim of sexual harassment just as she described it."³⁴⁰ He was unconvinced, however, that repeated offensive touching, threats of rape, exposure to constant lurid sexual description, and sexual advances which Bohen literally had to fight off, would necessarily violate Title VII.³⁴¹ His reluctance to find actionable sexual harassment in this situation suggests a general reluctance to accept sexual harassment as a legitimate cause of action. Under his analysis, an employee who is subject to severe and prolonged harassment, and subsequently files a sex discrimination suit, may be fired at any time because she is not likable.

2. *She Asked For It: Welcomeness*

The Supreme Court has also approved investigating a plaintiff's personality and behavior in order to determine if a sexual harassment claim is valid. In *Meritor*, the Court stated that the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"³⁴² In making this determination, the Court said "[t]he correct inquiry is whether [the plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome."³⁴³ Not only does this shift the burden to the plaintiff to affirmatively demonstrate "unwelcomeness," it also directs the inquiry away from the defendant's actions. The plaintiff's behavior is scrutinized in an effort to excuse the sexual harassment.³⁴⁴ The Supreme Court held that testimony regarding the plaintiff's style of dress and personal fantasies were "obviously relevant" as part of the "totality of the circumstances" to determine "welcomeness."³⁴⁵

The assumption of this evidentiary burden is that women who

339. *Id.* at 1243 n.4.

340. *Id.* at 1239.

341. *Id.* at 1244.

342. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

343. *Id.*

344. Courts will use any remote or dubious indication that the plaintiff did not find the harassment unwelcome to defeat the plaintiff's claim. *See, e.g., Highlander v. K.F.C. Nat'l Management Co.*, 805 F.2d 644, 646 (6th Cir. 1986) (holding that evidence that the plaintiff asked her supervisor not to intervene in an attempt to deal with the harassment herself helps defeat claim). *But see Ellison v. Brady*, 924 F.2d 872, 874 (9th Cir. 1991) (stating that the plaintiff's initial request that her supervisor refrain from interference with the harassing behavior was not fatal to her claim).

345. *Meritor*, 477 U.S. at 69. (internal citations omitted).

dress or speak provocatively are welcoming sexual harassment.³⁴⁶ Otherwise inappropriate behavior is excused if the woman did not conform to the court's definition of non-provocative behavior or dress.³⁴⁷ Consequently, the sexual harassment victim is considered to have "precipitated" the harassment by dressing, speaking, or acting in any manner which could be interpreted as "provocative."³⁴⁸

Some courts require more than an explicit rejection by the plaintiff before finding the harassment unwelcome. In *Dockter v. Rudolf Wolff Futures, Inc.*,³⁴⁹ the district court found that the defendant engaged in sexual touchings, including groping the plaintiff and attempting to kiss her, made numerous sexual propositions, and engaged in other sexual and physical intimidation of the plaintiff.³⁵⁰ The plaintiff explicitly and repeatedly rejected these advances.³⁵¹ Nonetheless, the court found that "[a]lthough the plaintiff rejected [the defendant's numerous propositions], her initial rejections were neither unpleasant nor unambiguous, and gave [the defendant] no

346. This is a particularly troubling aspect of sexual harassment jurisprudence. One commentator noted:

It would be unreasonable to say that a woman who dresses in an "objectively" provocative manner — if such a thing could ever be defined — welcomes conduct of a sexual nature from all men in her immediate working environment. The difficulty of assessing what kind of dress qualifies as "provocative," combined with the unfairness of the presumption that if a woman dresses provocatively she is doing it for the benefit of a particular man . . . renders [*Meritor's*] holding on the issue both unwise and skewed in the favor of the defendant.

Childers, *supra* note 46, at 872 n.57.

347. The dissent in *Ellison* noted that "[t]he focus on the victim of the sexually discriminatory conduct has its parallel in rape trials in the focus put . . . on the victim's conduct rather than on the unlawful conduct of the person accused." *Ellison*, 924 F.2d at 884 (Stephens, D.J., dissenting).

The requirement of "unwelcomeness" is comparable to the requirement of showing "resistance" for rape victims. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 815 (1991). In both cases, the courts require affirmative action by the victim to demonstrate an unwillingness to participate. Some courts require more than several explicit rejections by the plaintiff in order to prove "unwelcomeness." See, e.g., *Dockter v. Rudolf Wolff Futures*, 684 F. Supp. 532, 537 (N.D. Ill. 1988) ("Although plaintiff rejected [the defendant's numerous propositions], her initial rejections were neither unpleasant nor unambiguous, and gave [the defendant] no reason to believe that his moves were unwelcome."), *aff'd*, 913 F.2d 456 (7th Cir. 1990).

348. As one commentator noted, finding that the plaintiff dressed or acted provocatively "[n]eatly undermin[es] a plaintiff's claim of sexual harassment with undue and entirely subjective emphasis on unwelcomeness, [and this type of inquiry relies on terms such as] 'provocative,' 'flirtatious,' and 'sexually inviting' as if these were objective realities susceptible to scientific determination". Childers, *supra* note 46, at 874.

349. *Dockter v. Rudolf Wolff Futures, Inc.*, 684 F. Supp. 532 (N.D. Ill. 1988).

350. *Id.* at 533.

351. *Id.*

reason to believe that his moves were unwelcome."³⁵² It is inconceivable that the plaintiff's explicit rejections could fail to notify the defendant that "his moves were unwelcome."³⁵³

Another way courts use the "welcomeness" issue to defeat plaintiff's claims is demonstrated in *Weinsheimer v. Rockwell International Corporation*.³⁵⁴ In this case, the court found that because Weinsheimer participated in the sexual discussions at work, she could not claim that weekly requests by a co-worker to "suck him" and "give him head," or his grabbing of her breasts and genitals were truly unwelcome.³⁵⁵ The court simply ignored or dismissed the abusive physical harassment when Weinsheimer was shoved into a filing cabinet and had a knife held to her throat. The court noted that even the incident in which another co-worker placed his exposed penis in Weinsheimer's hand was not reported "until months later."³⁵⁶ This led the court to conclude that it must not have really bothered her.³⁵⁷ To find that any person would "welcome" this type of behavior seems ludicrous. The court endorsed the theory that because the plaintiff used coarse and sexual language, she could not really be offended by any type of blatant sexual harassment, and therefore, her claim must fail.

3. *Another Missed Opportunity*

In *Harris*, the Supreme Court failed to address the relevancy of this type of inquiry,³⁵⁸ even though the district court used the personality inquiry to imply that Harris was not really injured by the defendant's actions. The district court opinion stated that "[Harris] would sometimes drink beer with her co-workers after hours, and would join in the conversations, sometimes with coarse language."³⁵⁹ Apparently, the assumption is that if Harris used coarse language in a social setting, she cannot be offended by it in the workplace, and if she socialized or drank beer with her co-workers, then she was not really offended by the defendant's harassment. Whatever the district

352. *Id.*

353. *Id.*

354. 754 F. Supp. 1559 (M.D. Fla. 1990).

355. *Id.* at 1561.

356. *Id.* at 1564.

357. *Id.*

358. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

359. *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444 at *3 (M.D. Tenn. Feb. 4, 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd and remanded*, 114 S. Ct. 367 (1993).

court's rationale may have been, the opinion makes clear that this behavior by Harris is relevant as to whether Harris was injured by the defendant's harassment.³⁶⁰ The Supreme Court did not address this issue, however, and therefore courts are free to inquire into a plaintiff's activities outside the workplace.³⁶¹

Proponents of an unlimited "welcomeness" inquiry would argue that the danger of limiting these types of inquiries is that sometimes "welcomeness" can be a legitimate issue.³⁶² However, the possibility for misapplication and abuse is evident. In *Rabidue*, the Sixth Circuit found that a woman who is uncooperative cannot be offended by vulgar anti-female language and pornography in the workplace.³⁶³ In *Meritor*, the Supreme Court found that a woman's attire is relevant to whether her supervisor's demand for sex is actionable sexual harassment.³⁶⁴ And in *Weinsheimer*, the court determined that a woman's use of obscene language intimates a welcomeness of even the most egregious sexual harassment.³⁶⁵ Unfortunately, the Supreme Court's *Harris* decision failed to address this issue and left unguided and unrestricted a court's ability to delve into the personality and privacy of any plaintiff.³⁶⁶

C. *That's Incredible: Attack on the Plaintiff's Credibility*

Courts' initial reluctance to recognize sexual harassment as a violation of Title VII was, in part, due to the lack of credibility women have traditionally had within the legal system.³⁶⁷ Although sexual

360. *Id.* The statement is placed within a discussion of whether or not Harris was injured by the defendant's conduct, giving rise to the assumption that it was relevant to that discussion. In another portion of the opinion, the district court states "[n]either do I believe that plaintiff was subjectively so offended that she suffered injury, despite her testimony to the contrary. . . . Plaintiff herself cursed and joked and appeared to her co-workers to fit in quite well with the work environment." *Id.* at *7.

361. *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993). Rather, the Court stated again to look to the totality of the circumstances, thereby sanctioning this type of broad based inquiry. *Id.*

362. See *supra* note 326 (discussing why truly "welcomed" behavior would not qualify as sexual harassment). Usually, however, it is only useful in those cases in which the court thinks the plaintiff welcomed the harassing behavior at the time and subsequently fabricated her claim. One other possible situation in which this issue could arise is determining whether a defendant "thought" that the sexual harassment was welcome. How this would affect liability is unclear. See *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (stating that a defendant could be liable for sexual harassment without knowing the behavior was unwelcome or offensive).

363. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 615 (6th Cir. 1986).

364. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1985).

365. *Weinsheimer v. Rockwell Int'l Corp.*, 754 F. Supp. 1559, 1564 (M.D. Fla. 1990).

366. See *supra* notes 358-61 (discussing *Harris's* failure to address this issue).

367. See *supra* note 20 (discussing the reluctance of courts to believe women's sexual harass-

harassment is now recognized as unlawful behavior, courts have failed to eradicate remnants of the outdated notion that vengeful women regularly fabricate claims against men. Indeed, some courts strain the boundaries of reality in order to discredit a plaintiff charging sexual harassment.³⁶⁸

Courts often demonstrate their reluctance to believe women who charge sexual harassment in one of two ways. First, a court may simply declare, without explanation, that they find the woman not credible.³⁶⁹ Second, a court may discredit the woman by finding or speculating that ulterior motives prompted her to file the complaint.³⁷⁰ Ulterior motives are easy for a court to accept because they are conveniently supplied by defendants as a complement to defendants' blanket denials, and present an alternate explanation for the plaintiff's charge. Whatever the supposed ulterior motive is, it fuels the fear that scorned or angry women regularly file false sexual harassment charges as revenge for some other slight or injustice.³⁷¹ Moreover, a finding that a plaintiff is not credible may occur even if the plaintiff has corroborating witnesses or the defendant is shown to be non-credible.³⁷² Whatever path the court follows to conclude that a plaintiff is not credible, the result is too often a denial of her claim.³⁷³ A lower court's finding that the plaintiff is not credi-

ment claims).

368. See *infra* notes 375-401 (discussing cases in which the court discredits the plaintiffs' claims despite evidence to the contrary).

369. See, e.g., *Bohen v. City of East Chicago*, 622 F. Supp. 1234, 1239 (N.D. Ind. 1985) (finding that "[s]ome of Bohen's testimony is simply incredible" and nonetheless stating "[y]et for all this I am convinced that Bohen was the victim of sexual harassment, just as she described it"), *aff'd in part, rev'd in part*, 799 F.2d 1180 (7th Cir. 1986).

370. See *McKenna v. Weinberger*, 729 F.2d 783 (D.C. Cir. 1984) (discrediting the plaintiff's testimony regarding the sexual harassment and determining that the real problem was the plaintiff's personality).

371. Although judicial and public attitudes are not well documented in regards to sexual harassment, they are documented in regards to rape. The comparison, although not perfect, is helpful given the similarities of circumstances and defenses in both types of cases. See *Torrey, supra* note 20, at 1028 n.69 (stating that only 2% of rape claims turn out to be false, yet one study showed that 40% of Anglo men; 63% of Anglo women; 92% of Black men; 41% of Black women; 73% of Mexican American men; and 57% of Mexican American women believed that men are often falsely accused of rape).

372. See *infra* notes 377-401 and accompanying text (discussing cases in which courts ignored the plaintiffs' corroborating evidence or ignored evidence of defendants' lack of credibility).

373. See *infra* notes 377-401 and accompanying text (discussing cases in which courts fail to believe the plaintiffs and consequently deny their claims); see also *Estrich, supra* note 347, at 848 (noting that "virtually every decision on credibility [in sexual harassment cases] seems to assume the relevance of factors such as the presence of corroboration and the freshness of the woman's complaint, treating these factors as neutral indicia of credibility rather than as cards categorically stacked against women").

ble is especially damaging because appellate courts generally do not question or overturn credibility determinations.³⁷⁴

Defendants often employ the "vengeful plaintiff" defense, probably because it is so effective.³⁷⁵ Courts may believe even a non-credible defendant's claim that the plaintiff invented the charge to punish the defendant.³⁷⁶ In *Harris*, for example, the district court had to acknowledge that the defendant engaged in the accused conduct because the defendant admitted it.³⁷⁷ Given the defendant's admission, in order to deny relief, the court had to discredit Harris' claim that she suffered injury as a result of the defendant's conduct.³⁷⁸ In doing this, the court acknowledged that the defendant "is a vulgar man [who] demeans the female employees at [Forklift]"³⁷⁹ and that some comments made to Harris were "truly gross and offensive,"³⁸⁰ but refused to believe that Harris was injured by this conduct.³⁸¹ Harris testified in detail to the effects the harassment had on her professional and personal life, but the court simply did not believe her.³⁸² Rather, the court speculated that the charge could be the result of a deteriorating business relationship between Harris' husband and the defendant, as the defendant had claimed.³⁸³ The court

374. *Meritor* recognized the importance of credibility determinations stating, "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

375. See *infra* notes 377-88 and accompanying text (discussing the defendant's use of this defense in *Harris*).

376. See *infra* notes 377-88 and accompanying text (discussing the defendant's assertion in *Harris* that the plaintiff filed the suit in retaliation for an unrelated dispute).

377. *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444 at *3 (M.D. Tenn. Feb. 4, 1991), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd and remanded*, 114 S. Ct. 367 (1993).

378. The court succeeded in discrediting Harris' claim of injury by simply stating "[n]either do I believe that plaintiff was subjectively so offended that she suffered injury, despite her testimony to the contrary." *Id.* at *7.

379. *Id.* at *5.

380. *Id.* at *7.

381. *Id.* One of the court's justifications for discrediting Harris' testimony that she suffered any injury was that "[Harris] repeatedly testified that she loved her job." *Id.* Testimony that a plaintiff liked her job, despite the sexual harassment, is often fatal to her claim. In *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981), the court denied relief to the plaintiff despite numerous sexual touches and propositions, noting that the plaintiff could not have been affected by the harassment because she testified that she enjoyed her job. *Id.* at 1315-16; see also *Scott v. Sears Roebuck & Co.*, 798 F.2d 210, 214 (7th Cir. 1986) (finding testimony that the plaintiff considered one of the defendants her friend evidence that she was not really sexually harassed).

382. *Harris*, 1991 WL 487444 at *3. Harris testified that "she was experiencing anxiety and emotional upset because of [the defendant's] behavior. She did not want to go to work; she cried frequently and began drinking heavily; and her relationship with her children became strained." *Id.*

383. *Id.* at *4.

entertained the defendant's theory despite evidence that the defendant was not a credible witness. It was proven that the defendant had doctored his records to provide false evidence that Harris was a poor employee.³⁸⁴ Additionally, there was evidence corroborating Harris' testimony that the business relationship between her husband and the defendant deteriorated only after she filed the sexual harassment claim.³⁸⁵ Despite this evidence, the court stated "I am certain that [the defendant's] business relationship with plaintiff's husband played more of a role in plaintiff's dissatisfaction with her job than plaintiff admitted. . . . I do not doubt that plaintiff had some bitter feelings towards [the defendant] over this."³⁸⁶ Even though there was evidence to corroborate Harris' story regarding the timing of the business dispute, the court discredited Harris with these statements and justified its finding by suggesting an alternate, and illegitimate motive for her sexual harassment charge.³⁸⁷ This, in turn, bolstered the finding that she was not really harmed by the sexual harassment.³⁸⁸

Similarly, the district court in *Vinson v. Taylor*³⁸⁹ refused to believe Vinson's testimony that she was coerced into sexual relations with the defendant, or that she was forcibly raped by him.³⁹⁰ During the trial, the *Vinson* court refused to allow evidence in Vinson's case

384. *Id.* at *5. Proof that a defendant doctored records to give the impression that the plaintiff was a poor employee is apparently not very significant. In the Sixth Circuit *Rabidue* decision, the court accepted without explanation that "the district court clearly assigned greater credibility and weight to the defendant's witness." *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 618 n.3 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). This finding was not questioned by the court of appeals although there was testimony by a co-worker that a supervisor withheld unemployment compensation to Rabidue after she was fired in retaliation for her sexual harassment suit. *Id.* at 627 (Keith, C.J., concurring in part & dissenting in part). In addition, another co-worker testified that the same supervisor "instructed Osceola employees to write up negative encounters with [Rabidue]" threatening that otherwise she would be able to return to work. *Id.* (Keith, C.J., concurring in part, dissenting in part).

385. *Harris*, 1991 WL 487444 at *4-5. Corroborating evidence was provided by a letter written by the defendant's secretary. The letter confirmed a telephone conversation which terminated the business arrangement with Mr. Harris and was dated after Mrs. Harris filed her sexual harassment suit. *Id.* at *4.

386. *Id.*

387. *Id.*

388. *Id.* The court goes on to state "[b]usiness relationships rarely deteriorate just like that, especially between social friends." *Id.* The court refers to the Hardys and the Harris's as "social friends" although there was no evidence indicating they went out on more than one occasion. *Id.*

389. 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. Feb. 26, 1980), *rev'd and remanded*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd and remanded sub nom.* *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

390. *Id.* at 38.

in chief to establish a pattern of sexual harassment committed by the defendant upon other female employees.³⁹¹ Although the case turned into a "swearing match," with the defendant denying all charges, the court accepted the defendant's position and excluded evidence that may have corroborated Vinson's case.³⁹² To buttress its decision to deny relief, the *Vinson* court stated that if there was a sexual relationship between Vinson and the defendant, "that relationship was a voluntary one by plaintiff having nothing to do with her continued employment."³⁹³ The court dismissed the idea that Vinson could have been coerced into a sexual relationship as the result of the defendant's superior position because "[a]ll raises, bonuses, and promotions were determined by [other officials], not [the defendant], who only made written recommendations."³⁹⁴ Given the fact that the defendant was the bank's branch manager and recommended all "raises, bonuses, and promotions," concluding that the defendant had no "real" authority over Vinson seems ludicrous.³⁹⁵ Nonetheless, this conclusion totally undermined Vinson's sexual harassment claim.

Similarly, the court in *Bohen v. City of East Chicago* credited the defendant's argument that Bohen was fired for "obstreperous and insubordinate conduct," and not for filing a sexual harassment claim.³⁹⁶ However, the court found that the sexual harassment had occurred.³⁹⁷ This finding necessarily implies that almost every witness for the defense lied during their testimony. Every person accused of sexual harassment denied committing it or even being aware of it.³⁹⁸ Despite these witnesses' lack of credibility, the court believed them when they testified that Bohen was fired "for cause."³⁹⁹ Even though the court noted that one of the fire depart-

391. *Id.* at 38 n.1. The court did advise Vinson that she may be able to introduce this evidence at a later time, but she did not attempt to reintroduce it. *Id.*

392. *Id.*

393. *Id.* at 42.

394. *Id.* at 43.

395. *Id.* On appeal, the District of Columbia Court of Appeals was more realistic and sympathetic to Vinson's claim of coercion noting that "[t]he mere existence — or even the appearance — of a significant degree of influence in vital job decisions gives any supervisor the opportunity to impose upon employees." *Vinson v. Taylor* 753 F.2d 141, 150 (D.C. Cir. 1985), *aff'd and remanded sub nom. Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

396. *Bohen v. City of East Chicago*, 622 F. Supp. 1234, 1237 (N.D. Ind. 1985), *aff'd in part, rev'd in part*, 799 F.2d 1180 (7th Cir. 1986).

397. *Id.* at 1240.

398. *Id.* at 1238-39.

399. *Id.* at 1241.

ment's employees was a "drunken lecher (sic)," who drank at work, and another was "illiterate" and "incapable," it did not question why they retained their employment, while Bohen, who was quite "capable," was fired.⁴⁰⁰ The court merely concluded that the department "live[s] with substandard performance" from its employees.⁴⁰¹

These examples indicate a judicial willingness to rely on otherwise non-credible witnesses or to make unrealistic assumptions in order to impeach the credibility of sexual harassment plaintiffs.⁴⁰² The Supreme Court's *Harris* decision did not address this.⁴⁰³ Although *Meritor* acknowledged that credibility determinations are crucial to deciding whether sexual harassment is "welcomed,"⁴⁰⁴ neither *Meritor* nor *Harris* gives any guidance as to how to make these determinations. Given its abstract nature, credibility is not an issue easily addressed by statements of rules. One possible solution to unsupported credibility determinations is to require courts to base their credibility determinations on findings of facts that are reported in the opinion. This would require district courts to at least verbalize their reasons for finding a plaintiff not credible. It would also allow reviewing courts to judge the soundness of the credibility determinations made by the district court. Unfortunately, the Supreme Court's *Harris* decision offered no guidance on determinations of credibility and therefore lower courts retain unfettered discretion to determine credibility issues.

D. *Innocent Flirtation/Common Behavior*

The final theme evident in many sexual harassment claims which serves to deny relief is an underlying fear that normal male heterosexual behavior will become illegal under an expansive definition of sexual harassment.⁴⁰⁵ There is, in fact, empirical evidence demonstrating that men and women do differ as to what constitutes sexual harassment when dealing with gray areas, such as a request for a

400. *Id.* at 1243.

401. *Id.* at 1244.

402. See *supra* notes 377-401 and accompanying text (discussing cases in which the plaintiff's credibility helped to defeat her sexual harassment claim).

403. See *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993) (declining to address credibility issues).

404. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

405. See *supra* notes 406-20 and accompanying text (discussing cases in which courts appear to factor this consideration into determining whether actionable sexual harassment should be found).

date.⁴⁰⁶ The concern over ordinary "male behavior" becoming unlawful however, seems to have created a judicial backlash which defeats claims based on this notion, even when the behavior is clearly outside of the so called "gray" area.

Once again, the most extreme example of this phenomenon is found in the Sixth Circuit's *Rabidue* decision.⁴⁰⁷ In regards to the pornographic material displayed in the workplace, the Circuit court states that

[t]he sexually oriented poster displays had a de minimis effect on [Rabidue's] work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.⁴⁰⁸

In addition, the Sixth Circuit quotes favorably from the district court's opinion stating "[i]ndeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girly magazines may abound. Title VII was not meant to — or can — change this."⁴⁰⁹

Clearly, this justification for allowing pornography in the workplace is a perversion of the intent of Title VII.⁴¹⁰ If the intent of Title VII, with respect to sex discrimination, was to maintain the status quo measured by the outer boundaries of social acceptability, it would be totally ineffective at preventing sexual harassment.⁴¹¹ As recently as 1980 one court opined that "the making of improper sexual advances to female employees [was] standard operating procedure, a fact of life, a normal condition of employment,"⁴¹² and therefore not violative of Title VII.⁴¹³ If the *Rabidue* standard of prevailing social standards were applied to test a violation of Title

406. See *supra* note 11 (discussing the differences between women and men in evaluating what behavior constitutes sexual harassment).

407. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

408. *Id.* at 622.

409. *Id.* at 620-21 (quoting *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 430 (E.D. Mich. 1984)).

410. See *supra* notes 31-34 and accompanying text (discussing the intent of Title VII).

411. As the *Rabidue* dissent notes, "I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture." *Rabidue*, 805 F.2d at 627 (Keith, C.J., concurring in part & dissenting in part).

412. *Bundy v. Jackson*, 641 F.2d 934, 939 (D.C. Cir. 1981) (quoting lower court).

413. *Id.*

VII, "improper sexual advances" would never have come under the purview of Title VII.

Other courts have exhibited a similar, albeit less extreme, tendency to view some plaintiffs' claims of sexual harassment as normal heterosexual behavior.⁴¹⁴ In arriving at this conclusion, courts either minimize the plaintiffs' injuries or deny them altogether and the defendant is absolved of any wrongdoing.⁴¹⁵

In *Dockter v. Rudolf Wolff Futures*,⁴¹⁶ the district court minimized the impact of the sexual harassment by referring to the defendant's behavior as "preening, primping and posturing."⁴¹⁷ When referring to the defendant's hiring of Dockter, it states "in an effort to impress [Dockter] and secure her company in the future, he offered her the job at a salary level far in excess of what she was then making."⁴¹⁸ After hiring Dockter, the court of appeal's opinion states that "the stage was set for [the defendant] to put on his 'show.'"⁴¹⁹ Both courts condone the defendant's hiring of Dockter for the sole purpose of developing a sexual relationship with her. Furthermore, they imply that the defendant was actually doing her a favor by hiring her and that based on her salary, she should almost expect to be sexually harassed. It is abominable that contemporary courts forgive the "purchasing" of women for purely sexual motives.

Addressing the defendant's grabbing of Dockter's breast, the district court states "[a]fter one misguided act, in which he briefly fondled Plaintiff's breast and was reprimanded by her for doing so, he accepted his defeat and terminated all such conduct."⁴²⁰ The use of words such as "posturing," "fondled," and "misguided" implies a romantic exchange between two consenting parties, conjuring up images of awkward teenagers.

These decisions trivialize the defendants' conduct and its impact on the plaintiffs. The message is clear. Women should not expect men to behave any differently at work than they would elsewhere. So, if a man is a "sexual beast" unable to control his desire, or a "smooth talker" putting on a "show" at the plaintiff's expense, too

414. See *infra* notes 416-24 (discussing opinions that illustrate this phenomenon).

415. See *infra* notes 416-24 (discussing the lower and appellate court decisions in *Dockter*).

416. 684 F. Supp. 532 (N.D. Ill. 1988), *aff'd*, 913 F.2d 456 (7th Cir. 1990).

417. *Id.* at 533.

418. *Id.*

419. 913 F.2d 456, 459 (7th Cir. 1990).

420. *Dockter*, 684 F. Supp. at 533.

bad.

The Supreme Court's *Harris* decision failed to adequately address this issue. Clearly, there are differing standards of conduct that should apply to the workplace, as opposed to other situations. Courts would not question the inappropriateness of intoxication in the workplace, but some will tolerate behavior such as groping a woman breasts,⁴²¹ constant pressure for sexual acquiescence,⁴²² or bombardment of sexual innuendo and insult.⁴²³ The Supreme Court's failure to state explicitly that acceptable behavior in the workplace is not governed by social behavior that may be "acceptable" in other situations permits lower courts to continue to rely on cases such as *Rabidue*⁴²⁴ as good authority.

E. The Civil Rights Act of 1991

It could be argued that the 1991 Civil Rights Act jury provision may resolve the problems of judicial biases infecting sexual harassment opinions. For instance, because either party may demand a jury when punitive or compensatory damages are requested,⁴²⁵ a plaintiff may not be burdened by judicial misconceptions that serve to defeat her claim. However, upon examination, it appears that the availability of a jury may have a very limited impact.⁴²⁶

First, many sexual harassment decisions are dismissed or decided at the summary judgement stage, without the aid of a jury.⁴²⁷ Second, judges still instruct juries as to relevant law in their jurisdiction.⁴²⁸ Third, juror attitudes in rape cases, which can be analogized

421. *Id.* (finding that repeated propositions and harassment including trying to kiss plaintiff several times and groping her breast not sufficient to violate Title VII).

422. *Bohen v. City of East Chicago*, 622 F. Supp. 1234, 1240-41 (N.D. Ind. 1985) (finding that constant pressure by a supervisor for the plaintiff to engage in sexual activity may not be sufficient to violate Title VII), *aff'd in part, rev'd in part*, 799 F.2d 1180 (7th Cir. 1986).

423. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 622 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

424. *Id.*

425. *See supra* note 42 and accompanying text (noting that the new Act allows for jury trials in Title VII cases).

426. *See infra* notes 427-29 and accompanying text (discussing issues which may serve to limit the impact of jury trials in Title VII cases).

427. *See, e.g., Ulrich v. K-Mart Corp.*, 858 F. Supp. 1087, 1092 (D. Kan. 1994) (granting defendant's motion for summary judgment and dismissing plaintiff's Title VII claims); *Ott v. Dev. Corp.*, 846 F. Supp. 266, 277 (W.D.N.Y. 1994) (granting summary judgment in favor of defendant and dismissing plaintiff's sex discrimination claim in its entirety); *Doe v. R.R. Donnelley & Sons Co.*, 843 F. Supp. 1278, 1284 (S.D. Ind. 1994) (granting summary judgment against plaintiff's Title VII sexual harassment action).

428. FED. R. CIV. P. 51.

to sexual harassment cases, have been shown to be subject to the same biases that afflict judges in sexual harassment cases.⁴²⁹ Finally, the creation of judicial standards customarily occurs at the appellate level, which is beyond the reach of a jury. Consequently, it appears that the availability of a jury may have a de minimis impact on the barriers created by judicial biases that serve to defeat many sexual harassment claims.

IV. CONCLUSION

The law of sexual harassment is not conducive to eliminating sexual harassment in the work place, given the vagueness of the governing standards and a court's ability to mold these standards. The Supreme Court's decision in *Harris* presented an opportunity to resolve many issues surrounding sexual harassment law. Although the *Harris* decision removed one barrier to sexual harassment plaintiffs — the need to demonstrate severe psychological injury — it failed to address the issues underlying the requirement of this injury. Courts can no longer require an "actual injury" or "severe psychological injury" from sexual harassment plaintiffs, but they remain free to devise other standards which may be equally difficult to meet.

Noelle C. Brennan

429. See Torrey, *supra* note 20, at 1046-49 (discussing a survey of potential jurors regarding their attitudes toward rape which found: 66% saw rape as being provoked by the victim's behavior or appearance; 34% believed that women should be responsible for preventing their own rape; and 11% believed that women ask for it).